TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

[redacted]

AMERICAN CAR AND FOUNDRY COMPANY, PLAINTIFF IN ERROR,

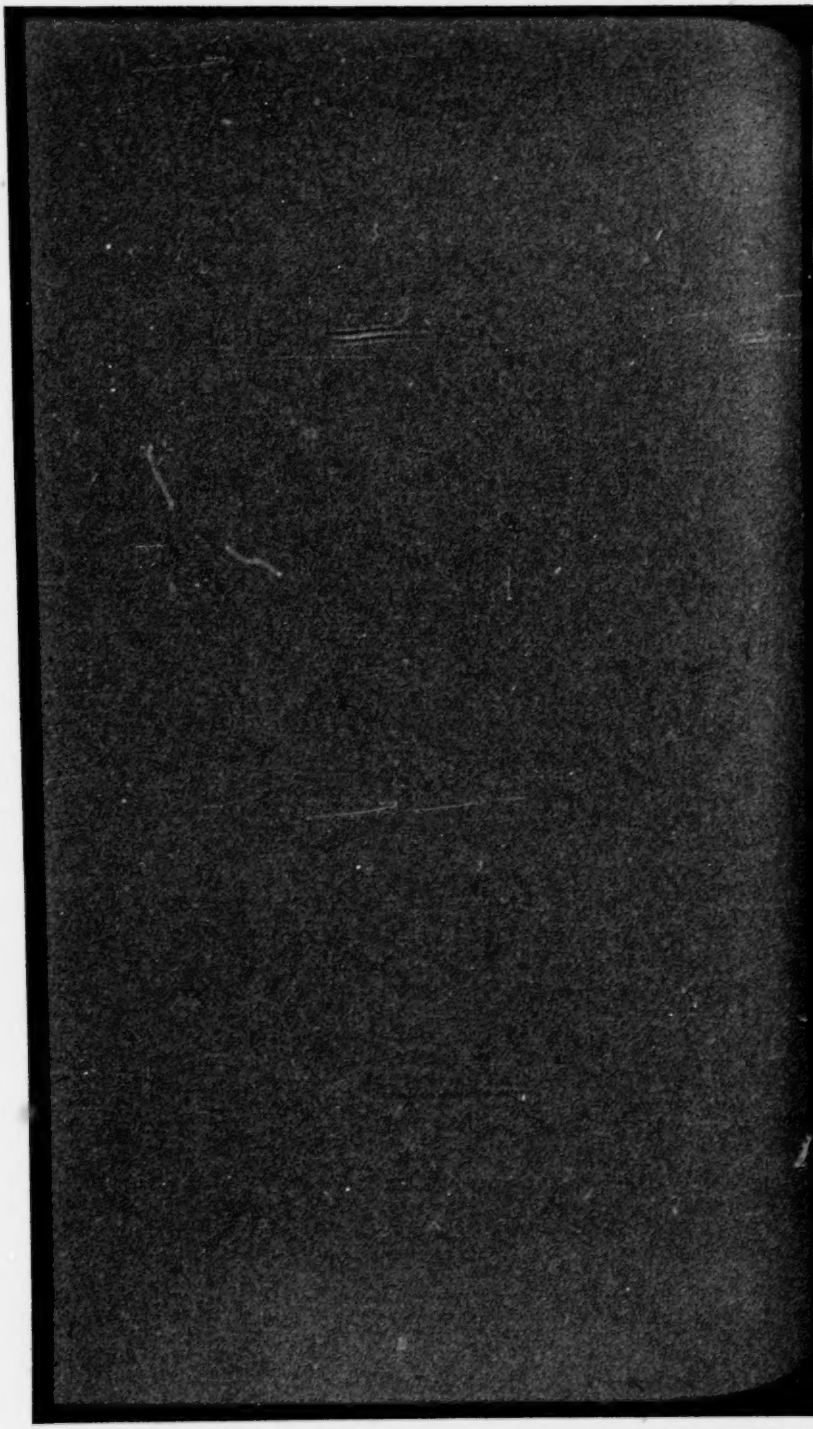
vs.

AGNES KEPPELMANN.

IN ERROR TO THE SUPREME COURT OF APPEALS, STATE OF [redacted]

FILED APRIL 2, 1915.

(23,010)



(23,612)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 138.

AMERICAN CAR AND FOUNDRY COMPANY, PLAINTIFF IN ERROR,

vs.

AGNES KETTELHAKE.

IN ERROR TO THE ST. LOUIS COURT OF APPEALS, STATE OF MISSOURI.

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1 UNITED STATES OF AMERICA, *ss*:

To Agnes Kettelhake, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the St. Louis Court of Appeals, wherein American Car and Foundry Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George D. Reynolds, Presiding Judge of the St. Louis Court of Appeals, this 11th day of March, in the year of our Lord one thousand nine hundred and thirteen.

GEO. D. REYNOLDS,
Presiding Judge of the St. Louis Court of Appeals.

2 I hereby acknowledge service of a true copy of the within citation this 11th day of March, 1913.

AGNES KETTELHAKE,
By GEO. SAFFORD, *Her Att'y.*

Filed Mar. 11, 1913, Joseph Flory, Clerk.

3 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the Honorable the Judges of the St. Louis Court of Appeals, Hon. Geo. D. Reynolds, Hon. Albert D. Nortoni, and Hon. Wm. H. Allen, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said St. Louis Court of Appeals before you, or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had in the said suit between Agnes Kettelhake and American Car and Foundry Company wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said American Car and Foundry Company as by its complaint appears. We being willing that error, if any hath been,

should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 11th day of April next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 11th day of March, in the year of our Lord one thousand nine hundred and thirteen.

Issued at office in the City of — Louis, with the seal of the District Court of the United States for the Eastern District of Missouri, dated as aforesaid.

[Seal of the United States District Court, Eastern Division of the Western Judicial District of Missouri.]

W. W. NALL,
Clerk of said District Court,
By —— ——, *Deputy.*

Allowed by
GEO. D. REYNOLDS,
Presiding Judge St. Louis Court of Appeals.

4 Filed Mar 11, 1913, Joseph Flory, Clerk.

5 St. Louis Court of Appeals.

STATE OF MISSOURI,
City of St. Louis, ss:

In obedience to the command of the foregoing writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said St. Louis Court of Appeals, at office in the City of St. Louis, Missouri, this 28th day of Mch., 1913.

[Seal of St. Louis Court of Appeals, Mo.]

JOS. FLORY,
Clerk of Said Court.

6 STATE OF MISSOURI,
City of St. Louis, ss:

Be it remembered, that heretofore, to-wit, on the 7th day of June, 1912, a certified copy of the judgment of the Circuit Court of the City of St. Louis, other proceedings and Order Granting Appeal to the Supreme Court of the State of Missouri, was received, on order of transfer from said Supreme Court, and filed in the office of the

Clerk of the St. Louis Court of Appeals; Said Certified Copy of Judgment, order granting Appeal, etc. is in words and figures as follows:

7 STATE OF MISSOURI,
City of St. Louis, ss:

Be it remembered, that heretofore to-wit: at the October Term, A. D. Nineteen Hundred and Eight, of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the Thirteenth day of October certain proceedings were had in cause Number 51928, Series A. of the causes in said Court, wherein Agnes Kettelhake is plaintiff and the American Car and Foundry Company et al., are defendants, which said proceeding as amended December 22nd, 1908, nunc pro tunc as of said October 13th, 1908, are in words and figures as follows, to-wit:

TUESDAY, December 22nd, 1908.

51928.

AGNES KETTELHAKE
vs.
AMERICAN CAR AND FOUNDRY COMPANY, et al.

The Court having duly considered the stipulation of the parties hereto by their respective attorneys, heretofore filed and submitted herein, doth order that the judgment rendered in this cause be amended of record of October 13th, 1908 in conformity to said stipulation which is accordingly done in words and figures as follows nunc pro tunc of said date to-wit:

TUESDAY, October 13th, 1908.

51928.

AGNES KETTELHAKE
vs.
AMERICAN CAR AND FOUNDRY COMPANY, WILLIAM W. EILERS AND QUINCY MARTIN.

8 Now again come the parties hereto by their respective attorneys and also comes the Jury heretofore empannelled and sworn herein, thereupon the plaintiff by leave of Court files herein an amended petition, and the defendants by attorney apply for a continuance of this cause which application was denied by the Court: whereupon defendants move the Court to strike out said amended petition on the ground that the allegations thereof constitute a departure from the cause of action stated in the original petition, whein motion was overruled by the Court: Thereupon said defendants filed two separate motions to require plaintiff to

elect in each count upon which cause of action stated in each of said count- respectively, she will proceed to trial; thereupon the plaintiff elects as to the first count in said amended petition to stand in section 2864 R. S. of Missouri, 1899, as amended by an act entitled "Damages and contributions in Action of Tort," and as to the second count stated in said amended petition plaintiff elects in said count which is covered by section 2865 R. S. of Missouri, 1899, and the provisions of Section 2866 of R. S. of Missouri as amended. Thereupon the defendants by leave of Court withdrew their answers filed to the original petition and refiled the same as answers to the amended petition; whereupon the plaintiff by leave of Court, withdraws her original replies herein and refiles the same; and at the close of plaintiff's case the defendant American Car and Foundry Co.; William W. Eilers and Quincy Martin file their separate demurrers to the evidence over the objections of plaintiff thereto, to which ruling of the Court, plaintiff then and there saved her exceptions at the time: Thereupon plaintiff asked leave to take an involuntary nonsuit as to said defendants Quincy Martin and Wm. W. Eilers with leave to move to set the same aside, and leave to take said non-suit, was granted by the Court and said *said* involuntary non-suit with leave to move to set the same aside was taken; and thereupon the defendant, the American Car and Foundry Company orally moved the Court for time to prepare and file a petition and bond for removal from the State to the Federal Court, which
9 motion the Court then and there granted, and thereupon before said petition for removal and bond or either of them was filed, plaintiff by leave of Court orally moved the Court to set aside the involuntary non-suit which plaintiff had taken to Quincy Martin and Wm. W. Eilers, which motion of plaintiff was then and there overruled, to which ruling of the Court plaintiff then and there saved her exceptions at the time; thereupon the defendant American Car and Foundry Company filed its petition and bond for removal; whereupon plaintiff filed a demurrer to said petition for removal which said demurrer was then and there overruled by the Court, to which ruling of the Court plaintiff then and there saved the exceptions at the time. Whereupon plaintiff filed an answer to said petition for removal. Thereupon the Court overruled said petition for removal from the State to the Federal Court, to which ruling of the Court, the defendant the American Car and Foundry Company then and there saved its exceptions at the time.

Thereupon the trial of said cause progressed as to the first count only of the amended petition and being terminated, the Jurors aforesaid, upon their oaths as aforesaid say:

"We the Jury in the above cause find in favor of plaintiff on the issues herein joined on the first count of the petition, and assess her damages at the sum of Five thousand Four hundred ($5400.00) Dollars. Alexander A. Fischer."

It is thereupon considered and adjudged by the Court that the plaintiff be non-suited as to the defendants Wm. W. Eilers and Quincy Martin, and that said defendants go hence without day: and it is further ordered and adjudged by the Court that the plain-

tiff recover of the defendant American Car and Foundry Company, the damages aforesaid as found together with her costs and charges herein expended and have execution therefor.

10 And afterwards, at the December Term, 1908, of said Court, the following further proceedings were had in said cause, to-wit:

51928.

AGNES KETTELHAKE
vs.
AMERICAN CAR AND FOUNDRY COMPANY, et al.

WEDNESDAY, January 6th, 1909.

Now at this day comes the defendant American Car and Foundry Company by its attorney, and on its motion it is ordered by the Court that said defendant be granted until February 5th, 1909, in which to file its Bill of Exceptions herein and thereupon it files herein an affidavit for an appeal, and it appearing to the Court that said defendant has deposited with the Clerk of this Court the Docket fee of Ten Dollars as required by law, it is ordered by the Court that said defendant be allowed an appeal to the Supreme Court of Missouri from the judgment heretofore rendered in this cause, and on its motion it is ordered by the Court that said defendant be allowed until January 26th 1909 in which to file its appeal bond in the sum of Eleven thousand dollars to be approved by the Court.

11 STATE OF MISSOURI,
City of St. Louis, ss:

I, Fred H. Kreismann, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, do hereby certify, that the above and foregoing contains, a true, full and complete transcript of the judgment in the above entitled cause, and showing the term, and day of the term, month and year in which the same was rendered, and also, of the order granting an appeal in said cause, as fully as the same remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this the 19th day of March, 1909.

[SEAL.] FRED H. KREISMAN,
Clerk Circuit Court.

And on the same day, to-wit, the 7th day of June, 1912, a certified copy of the order of the Supreme Court of Missouri, transferring said cause to this court was filed in this office; said order being in words and figures as follows:

12 In the Supreme Court of Missouri, April Term, 1912.

AGNES KETTELHAKE, Respondent,
vs.
AMERICAN CAR AND FOUNDRY COMPANY, Appellant.

Appeal from the Circuit Court of the City of St. Louis.

Now at this day it appearing to the satisfaction of the Court that no legitimate constitutional question is presented to the Court here, doth order that said cause be and the same is hereby transferred to the St. Louis Court of Appeals.

STATE OF MISSOURI, *Set:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at April Term thereof, 1912, and on the 31st day of May, 1912, in the above entitled cause.

Given under my hand and the seal of said Court, at the City of Jefferson, this 3rd day of May, 1912.

[SEAL.] J. D. ALLEN,
Clerk."

And on the same day, to-wit, the 7th day of June, 1912, the following opinion of the Supreme Court was filed in this office, said opinion being in words and figures as follows:

13 In the Supreme Court of Missouri, Division No. 1, April Term, 1912.

No. 15307.

AGNES KETTELHAKE, Respondent,
vs.
AMERICAN CAR AND FOUNDRY CO., Appellant.

Appeal from the Circuit Court for the City of St. Louis.

Statement.

This suit was brought by the plaintiff against the appellant, a corporation of the state of New Jersey together with William W. Eilers and Quincy Martin, both citizens and residents of the state of Missouri, on account of the alleged negligent killing of her husband by defendant while running an engine and cars belonging to the appellant. Its purpose, as stated in the petition, was to recover $10,000 in accordance with the provisions of section 2864 of the

Revised Statutes of Missouri, 1899, as amended by the act entitled "Damages and Contributions in Actions of Tort," approved April 13, 1905 (R. S. 1909, sec. 5425.)

At the close of the plaintiff's evidence the court peremptorily instructed the jury to find for each of the defendants Eilers and Martin, and refused a similar instruction asked by the remaining defendant for itself. The plaintiff then took a non-suit as to each of said defendants with leave to move to set the same aside.

The appellant thereupon filed its petition for the removal of the cause to the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri on the ground of
14 the diverse citizenship of the remaining parties, together with its removal bond with securities admittedly qualified. The petition for removal was thereupon denied by the court, to which appellant excepted. The trial proceeded, resulting in a verdict and judgment for plaintiff for five thousand four hundred dollars ($5,400) from which this appeal is taken.

Thereupon plaintiff filed her motion to set aside the non-suit as to Eilers and Martin and reinstate the cause as to them, which was overruled by the court.

The appellant, in due time filed its motion for a new trial, assigning, among other grounds, that the court erred in refusing to sustain its application for removal and stating that this action was in contravention of section 2, article 3 of the Constitution of the United States; also of article 6 of the Constitution of the United States; also of the Act of Congress of the United States of America, designated as Act of March 3, 1875, 18 Stat. 470, as amended by the Act of Congress of March 3, 1887, 24 Stat. 552; as corrected by the Act of Congress of August 13, 1888, 25 Stat. 433; which Act and the amendments thereto relate to the jurisdiction of the Circuit Court of the United States and the removal of causes from State courts to the courts of the United States; and also in violation of the fifth and fourteenth amendments to the Constitution of the United States and section 30 of article 2 of the Constitution of Missouri.

Opinion.

The judgment of the circuit court was not sufficient in amount to sustain the jurisdiction of this court on that ground. It is claimed, however, that we have jurisdiction of this appeal because the case involves the construction of the Constitution of the United States or of this state, and that the validity of a statute of or authority
15 exercised under the United States is drawn in question. Upon the constitutional question so raised the appellant has not, for obvious reasons, favored us with any authority; it makes the claim as one propounds a conundrum leaving us to do the guessing.

Although jurisdiction founded upon such a question does not depend upon the validity of the claim set up under the constitution, it must involve a clear and substantial dispute or controversy. It must be real and colorable and not fictitious. If it involves the reversal of a settled policy crystallized in the adjudications of the

courts of final resort, it must deserve at least a word of reason to give it color. We find that the same question was suggested in In re Cilley, 58 Fed. Resp., 977, where the court said: "We will first dispose of the position taken by the petitioner on reargument, that the right of removal exists under article 3, paragraph 2, of the constitution of the United States, and cannot, therefore, be abridged by congress or denied by the court. This position is not tenable. The constitution declares the lines within which congress may confer jurisdiction, but the ground and limit of actual jurisdiction to be exercised by the courts are to be found in the acts of Congress, and not in the constitution. It is not necessary to inquire as to the extreme limit of the constitutional scope of judicial power. Within its scope, whatever that may be, Congress may confer jurisdiction, and so much of the constitutional grant of judicial power as is not bestowed upon the federal courts by legislative provision remains dormant. In other words, Congress is to define and describe to what extent the judicial power is to be exercised by the federal courts." The court adds to this statement a line of citations, princip-ly from the Supreme Court of the United States, which should settle the question had it been in doubt. It was again referred to in Stevenson v. Fain, 195 U. S., 165, in which Chief Justice Fuller said: "The Supreme Court alone possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot de-
16 prive it,' (United States vs. Hudson, 7 Cranch 32), but the jurisdiction of the Circuit Courts depends upon some act of Congress. Turner vs. Bank, 4 Dall, 8, 10; McIntire vs. Wood, 7 Cranch, 504, 506." This petition for removal painstakingly recites that the matter and amount in dispute exclusive of interest and costs, exceeds the sum or value of two thousand dollars. This, according to appellant's theory, is supererogatory for the consti-tional provision throws its mantle alike over all cases without limit as to amount. We do not think it can be said that a legitimate constitutional question is presented and we do not think we should encourage litigants in invoking the jurisdiction of this court by claims which are to be abandoned when they have served that purpose.

While this court has jurisdiction in cases involving the "construction" of the Constitution of the United States or of this state, it only has jurisdiction depending upon a federal statute where its "validity" is drawn in question. The "construction" of the acts of Congress relating to the removal of causes, and not their validity, being the question involved here, this court has no jurisdiction upon that ground. Nor is the validity of an "authority exercised under the United States" drawn in question. No authority has been exercised. This clause evidently contemplates that the jurisdiction of this court ought to be exercised for the protection of officers and other agents of the United States when questioned on account of their lawful acts done by virtue of authority having its foundation in the federal laws. The jurisdiction rests upon similar grounds to those for which the removal of causes from the state courts to the circuit courts of the United States is authorized by section 643 of the Revised Statutes of the United States for the protection of fed-

eral officers with respect to such acts by removing judicial
17 inquiry in relation thereto as far as possible from surroundings affected by local prejudice.

For the reasons stated we think that this case should be transferred to the St. Louis Court of Appeals, which is accordingly done.

Bond, C., concurs.

STEPHEN S. BROWN,
Commissioner.

Per Curiam:

The foregoing opinion of Brown, C. is adopted as the opinion of the Court. All concur except Valliant, J., absent.

STATE OF MISSOURI, *Set:*

I, J. D. Allen, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the opinion of Division No. 1 of said Court, delivered in the foregoing entitled cause, on the 31 day of May 1912, as fully as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of our said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 3rd day of June 1912.

[SEAL.] J. D. ALLEN, *Clerk.*"

And on the same day, to-wit, the 7th day of June, 1912, Appellant's Abstract of the Record was filed; a certified copy of which accompanies this transcript.

And on the same day, to-wit the 7th day of June, 1912, Respondent's Additional Abstract was filed; a certified copy of which accompanies this transcript.

18 And afterwards, to-wit, on the 11th day of November, 1912, the following record entry was made:

No. 13475.

"AGNES KETTLEHAKE, Respondent,
v.
AMERICAN CAR & FOUNDRY CO., Appellant.

Appeal from Circuit Court, City of St. Louis.

Now at this day come the said parties by their respective attorneys and after argument, submit this cause to the Court."

And afterwards, to-wit, on the 4th day of February, 1913, the following order was made by the Court:

No. 13475.

"AGNES KETTLEHAKE, Respondent,
v.
AMERICAN CAR & FOUNDRY CO., Appellant.

Appeal from Circuit Court, City of St. Louis.

Now again come the said parties by their respective attorneys and the court being now sufficiently advised of and concerning the premises doth consider and adjudge that the judgment rendered herein by the said Circuit Court, City of St. Louis be affirmed and stand in full force and effect; that said respondent recover of said appellant her costs and charges herein expended and have execution therefor. Opinion filed.

Said opinion is in words and figures as follows:

19 "In the St. Louis Court of Appeals, October Term, January Call, 1913.

No. 13475.

AGNES KETTELHAKE, Respondent,
v.
AMERICAN CAR & FOUNDRY CO., Appellant.

Appeal from Circuit Court, City of St. Louis.

Hon. Moses N. Sale, Judge.

Opinion Filed Feb. 4, 1913.

The appeal in this case, from a judgment against the American Car & Foundry Company, was originally taken by that company to the Supreme Court of the state. The verdict and judgment were for $5400. On consideration of the cause the Supreme Court, adopting an opinion by Mr. Commissioner Brown, transferred the cause to our court, the opinion reported under the title Kettelhake v. American Car & Foundry Company, — Mo., —; (unofficially) 147 S. W. 479. The action was originally instituted February 5, 1908, by plaintiff, widow of one Frank Kettelhake, against the defendant American Car & Foundry Company and two others for the recovery of damages alleged to have been sustained by reason of the death of her husband. As pleaded in the amended petition, the right of action set out in the first count of the petition purported to be based upon section 2864, Revised Statutes 1899, as amended by the Act approved April 13, 1905, (Session Acts 1905, p 135), now section 5425, Revised Statutes 1909, $10,000 being claimed as damages under the provisions of that act. The second count was founded on section 2866, Revised Statutes 1899, as amended by the Act ap-

proved March 19, 1907 (Session Acts 1907, p. 252), now section 5426, Revised Statutes 1909. Ten thousand dollars was like-
20 wise claimed under this act. Before the case was finally submitted to the jury, plaintiff dismissed as to the second count, so that is out of this case. Recovery was had on the first count and against the appellant American Car & Foundry Company alone, the plaintiff having taken an involuntary nonsuit as to the two individual defendants. It is in connection with this latter phase of the case that a federal question was sought to be injected into the case. We refer to the opinion of Mr. Commissioner Brown, before cited, for a full statement of the facts connected with this.

The errors here assigned by counsel for the appellant are four, namely, to the overruling of the demurrer to the evidence, to the admission of improper evidence tending to show plaintiff's poverty, to the giving of improper instructions and to the denial of the application of the American Car & Foundry Company's application for removal of the cause to the United States Circuit, now District Court.

It goes without saying that the demurrer to the evidence is to be determined on that of plaintiff, respondent here. A very careful reading and consideration of that satisfies us that it was sufficient to take the case to the jury. Plaintiff's husband was a car repairer in the employ of defendant, a corporation created and organized under and by virtue of the laws of the state of New Jersey, engaged in the manufacture and repair of cars in the city of St. Louis. It there had extensive shops and yards, moving cars in and about its yards by locomotive engines owned and operated by it, there being a network of tracks in its yards along which it moved and on which it placed cars in course of construction or repair. Immediately before the accident Kettelhake and a fellow employe named Lechner were engaged in what Lechner calls "working bottoms. That is, fastening nuts on the bottoms of these box cars." He further testi-
21 fied that to do this they worked under a car, which had been placed on one of the tracks in the yards of the defendant corporation. He and Kettelhake had been at that work all of the day of the accident, which occurred between four and five o'clock of January 23rd. A few minutes after four o'clock on that afternoon, having occasion to quit his work temporarily and go to a toilet room, he left Kettelhake at work under the rear car of three cars that were in place. As he was walking away from this car, he saw a switchman or brakeman coming toward him but on the south side of the cars at which witness had been working, witness then being on the north side. When he first saw this switchman or brakeman, the latter stopped, facing the engine and train of seven cars that were being backed down along track No. 12, upon which the three cars, under one of which they had been working, were standing. This man "just waved his hand." The cars were then coming down toward the three stationary cars. Witness said that when he saw this man signalling toward the on-coming train, he could see around the three standing cars and there was nobody back there. As the man signalled with his hand the train backed toward these cars

under which he and Kettelhake were working. They came down "about as fast as a man could walk." After the man had signalled to the on-coming train, it passed between him and witness. He then heard the bump of the on-coming cars as they struck the foremost of the three cars in place and that was all that he heard in the way of noise. He further testified that this was a few seconds after he had got from under the car where he had been working along with Kettelhake and under which he had left Kettelhake at work, and that no one had walked along past these three cars and no one had hallooed or called out to him or his partner at work there. Witness was standing very near to these cars in place when he saw this man signalling. He described and located it on photographs in evi-
dence, marked it out there and stated that he should judge
22 that it was between ninety and a hundred feet from where he was to where these cars were. While he was at this point there was nobody in sight except this switchman or brakeman. Witness looked back and could see all the way on the south side of the car; there was nobody on the south side or on the north side of the cars. When the cars bumped witness was between a hundred and a hundred and thirty feet from them, walking pretty fast. He remained away about ten minutes in all and went right back to where he and Kettelhake had been working; met a young man running in that direction who told him to take hold of a ladder. They constructed a stretcher out of that, went to where Kettelhake was and found him lying near the center of the car about a foot or a foot and a half from it; was lying there moaning and holding his leg; his pants were torn and bloody, torn at the knee. It was not to exceed eight or ten minutes from the time he had left Kettelhake at work until he got back and saw him lying at the side of the car. When he saw this switchman the latter was standing between these three cars and the on-coming train, apparently at or near a curve in the track and this switchman went back along the curve to where he could see his own train and gave a signal, giving it with his hands. As soon as the signal was given the engine and the seven cars came along and witness heard the crash of the impact and that he insisted, was the only noise he heard; heard no one call out before he left or while he was at work a few seconds before under the car with Kettelhake. His hearing was good; was sure he would have heard anyone that had called out to them to look out. When going toward the toilet met a couple of men who had been engaged at the same kind of work on the other end of the same car upon which he and Kettelhake had been working and spoke to
them; looked at his watch, on their request, and told them it
23 was five minutes past four.

Another witness, who was looking out of the window of a house near the yards of the defendant corporation, testified that he saw a man standing up working upon or near, within an arm's length, of the corner of a new freight car, one of three cars that had been standing on a track in the yards of the defendant corporation's plant for several days. He saw an engine and several cars moving along the track toward these three standing cars and move

them some distance, so that the car he saw the man working on struck that man and left him lying upon the ground, hallooing and waiving his arms. Witness ran about two hundred feet and met one Caporal, also working for the defendant corporation, as was the witness, and told him a man was hurt "in the car shops," to go and see about it. Caporal started right off and, as he testified, told the people in the office that a man had been killed "in the yards." Going with others of the employés to search for the man they found him lying by the third car of the three that were in place on track twelve. He was lying down about three feet from the rail of this track. That was about six or seven minutes after witness had been told of the accident. When he got there there was no engine about. This witness and the preceding one were unable to speak English, the first one referred to, who said he saw Kettelhake run over, giving his deposition through an interpreter.

Another witness, who with his partner had been working on the same car with Kettelhake and Lechner, testified he had quit work while Kettelhake and Lechner were still at work—saw them working under the bottom of the car and spoke to them; shortly afterwards met Lechner as the latter was hurrying to the outhouse—toilet room, and spoke to him. About fifteen minutes afterwards heard of the accident to Kettelhake; did not go back to see him; just heard he was killed.

24 While the witnesses for plaintiff testified that it was the custom of the employes of defendant corporation, in charge of its trains, to give warning of an approaching train, and while the witness Lechner, as we have above stated, testified most positively that no one had warned them on this occasion, either by walking along the cars under which he and Kettelhake were working, or by calling out, it is due appellant to say that a witness for appellant testified that he was the switchman and of the crew of the backing train on this occasion and that he had walked the whole length of the three cars, looked under them and called out, for the benefit of anyone at work there, "look out." He rather weakened this by saying, on cross-examination, that he was sure he had done so on this occasion because that was his custom. It was in evidence that the crew of that train did not know they had run over or hurt anyone until a couple of hours afterwards. Plaintiff's husband died the day following the accident. It was in evidence that he had been sent to this place to do this work by a person representing the defendant corporation, having authority to do so, that he had worked for the defendant corporation some time and that he was in the discharge of his usual duties in repairing cars when the accident happened.

Under this state of facts we think that plaintiff made out a case for the consideration of the jury and that the demurrer to the evidence was properly overruled. It is further to be said that with the evidence introduced by appellant before them, contradicting that of plaintiff as to warning having been given, the jury alone, guided by proper instructions, are the ones to pass upon which version is correct; their verdict on that issue concludes this court.

25 The evidence complained of as impro-erly admitted was that of plaintiff herself. She testified that she had lived with her deceased husband for nineteen years and up to the date of this death; that he had worked for her all their married life and had supported her. The court asked her if she had any other means of support, excepting him. To this counsel for defendant, appellant, objected, "As immaterial." The objection was overruled and defendant excepted. The witness then answered that she had not, that he was supporting her and the family. She afterwards, and without further objection, testified that her husband had worked for her and given her all of his earnings, testifying as to what they amounted to, and his age, and to the number of children they had and their ages, all minors; that her husband was in good health up to the time of his death; had worked for the defendant corporation for nearly three years; testified that he understood and spoke English; that his hearing and eyesight were good and that during all of their married life they had lived in this state.

The only objection interposed was to the questions by the court which we have set out, and that objection was that it was "immaterial."

We might dispose of this by saying that our Supreme Court has held in many cases that such objection is insufficient and does not constitute proper foundation for the assignment of error, being too general. As see Gayle v. Missouri Car & Foundry Co., 177 Mo. 427, l. c. 454; 76 S. W. 987. That is the rule even in criminal cases. State v. Crone, 209 Mo. 316, l. c. 330, 108 S. W. 555.

We are not overlooking the rule that when objection has been once made and acted upon and the ruling saved, it is unnecessary to repeat that objection to the same line of testimony. See Gold v. S. Pian Time Payment Jewelry Co., 165 Mo. App. 154, l. c. 163; 145 S. W. 1174. But the objection must be a proper one—made with certainty.

We place our ruling as to this evidence on the further ground that it has been distinctly held by our Supreme Court in Boyd v.
26 Missouri Pac. Ry. Co., 236 Mo. 54, 139 S. W. 561, that in actions under this section of the statute, the widow who seeks damages for the death of her husband may give in evidence the number and ages of minor children as bearing on her pecuniary loss. So we held in Hartnett v. United Railways Co., 162 Mo. App. 554, 142 S. W. 750. It is held in the Boyd Case that this section, while providing for a minimum and a maximum amount at the discretion of the jury, has a remedial side and as looking to that, the jury may consider the extent of the injury, and that as it also has a penal side, the jury has a right to consider the facts of the defendant's negligence; in brief, that is both penal and compensatory. We see no error in the admission of this testimony to which objection was made. Surely if competent to show the burdens cast upon the widow by the death of her husband by reason of her having children dependent upon her, it is competent, as tending to show what she had lost in the death of her husband, to prove that she had been left

penniless and thrown on her own resources to support herself and the minor children.

In this view of the case we see no error in giving the instruction of which special complaint is made. That told the jury that if they found for plaintiff they should award her not less than $2000 nor more than $10,000, "as you may deem fair and just under the evidence in this case with reference to the necessary injury resulting to her from the death of her husband; and in determining what such injury is, you should consider all the evidence before you, bearing upon that subject." As section 5425 is interpreted by our Supreme Court in Boyd v. Missouri Pac. Ry. Co., supra, we hold this instruction proper.

The only objection made to the other instructions, particularly the main instruction given by the court of its own motion, is the very general one that in setting forth the facts on which the plain-
27 tiff was entitled to recover, it "is subject to the criticism that even if the facts therein stated were admitted to be true, no right of recovery arose therefrom because of the rule invoked" by counsel in contending that the demurrer to the evidence should have been sustained. The gist of this contention of counsel is that the husband of plaintiff had assumed this risk, which resulted in his death. Degonia v. St. Louis, I. M. & S. R. Co., 224 Mo. 564, 123 S. W. 807; Van Dyke v. Missouri Pac. Ry. Co., 230 Mo. 259, 130 S. W. 1; McGrath v. St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872, and the like are relied upon in support of this condition.

Our court in Peppers v. St. Louis Plate Glass Co., 165 Mo. App. 556, 148 S. W. 401, determined that the rule announced in the McGrath Case, while applicable to section hands engaged in their work, did not apply to a case such as this. The writer of this dissented from the majority of his associates in that case; but it must now be accepted as the decision of the court. The case at bar is governed, as to this aspect of it, by the decision of our Supreme Court in Koerner v. St. Louis Car Co., 209 Mo. 141, 107 S. W. 481. The facts in that are quite similar to those in the one at bar. There it is held that where the defendant corporation, through one of its managing superintendents, had sent an employe to work on an unfinished car on one of its tracks, it was its duty to provide against other cars running down against the car upon which he was working and to see that other cars which were pulled out were not attached to the car upon which he was working, without giving him warning of the intention to move that car. It is also there held that while the employe, in entering the service of the employer, assumes the risks that ordinarily and usually are incident to the business being conducted by the employer, the employe does not assume the
28 risk arising from the employer's neglect to adopt suitable precautions for his safety. That duty is a continuing one and it will not suffice to say that when the employe went to work at that place it was reasonably safe. If the place was afterwards rendered unsafe by the negligent act of the employer in sending a switching crew in there who negligently moved the car upon which the employee was working, without giving him warning of their

intention to move it, then the employer is liable for the consequences of this negligent act of the crew in charge of the moving train. The employe had a right to presume, in the absence of knowledge to the contrary, that the defendant would furnish him a reasonably safe place to work; that the employer would not imperil his safety by sending its other employe in to move the car upon which he was working without notifying him. In the case at bar the jury were instructed very accurately along these lines. There was contradiction and conflict in the evidence as to whether a warning had been given, but there was positive, affirmative, evidence that none had been given to plaintiff's husband while he was at work in this dangerous position, and it was for the jury to determine, as already remarked, which version it would accept. There is no reversible error, therefore, presented in this case so far as concerns the evidence or the instructions.

The only remaining proposition in it is as to the refusal by the court to sustain the petition of defendant corporation for removal of the cause to the United States District Court. The facts connected with that are set out with sufficient particularity by Mr. Commissioner Brown in this case when before the Supreme Court, and we refer to his opinion, before cited, without repeating them here. We are unable to understand in the light of the facts here how it could be said that by taking an involuntary nonsuit as to the two individual defendants, they had so completely disappeared from the case as to leave the controversy one entirely between plaintiff and the corporation defendant. We think that Kansas City Suburban Belt Ry. Co. v. Herman, 187 U. S. 63, settles this. There the Supreme
29 Court distinguishes that case from Powers v. Chesapeake & Ohio Ry. Co. 169 U. S. 92, relied upon by counsel for appellant.

Finding no reversible error, the judgment of the circuit court is affirmed.

Nortoni and Allen, JJ., concur.

GEO. D. REYNOLDS,
Presiding Judge."

And afterwards, to-wit, on the 14th day of February, said date being within the time allowed by the court for filing such motions, comes the Appellant and files its motion for a re-hearing; which said motion for re-hearing is in words and figures as follows:

30 "In the St. Louis Court of Appeals, October Term, 1912, January Call, 1913.

AGNES KETTLEHAKE (Plaintiff), Respondent,
v.
AMERICAN CAR AND FOUNDRY COMPANY (Defendant), Appellant.

Comes now the appellant in the above entitled cause and respectfully moves the Court to grant it a rehearing of this cause for the reason that the Court has overlooked a part of the brief of appellant

on the question of the denial by the trial court of this appellant's application to remove the case to the Federal Court, and this appellant respectfully calls the Court's attention to the fact that nearly all of the opinion filed in this case by the Court is taken up in the discussion of other questions and that the question of the action of the trial court on defendant's application for removal to the Federal Court is disposed of in two or three sentences by this Court, although, in the opinion of this appellant's counsel, that question is the most important question raised on the record in this case. The Court in its opinion says that it thinks the case of Kansas City Suburban Belt Railway Company v. Herman, 187 U. S. 63, settles this, and that the Supreme Court of the United States distinguishes that case from the Powers case, 139 U. S. 92, relied upon by counsel for appellant here. We respectfully call the Court's attention to the distinction that exists between the case of Kansas City Suburban Belt Railway Company v. Herman in the 187th U. S., referred to by the Court and the case at bar. We cannot do
31 better than refer the Court to our discussion of that subject on pages 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of appellant's brief. It is needless for us to repeat that here but we do most earnestly request the Court before ruling upon this motion, to reread that portion of our brief, for we feel sure that the Court has overlooked the distinction that we there draw between the facts in the Herman case (187 U. S.) and the case at bar. That a very decided difference exists will be seen by reading that portion of our brief and then referring again to the decision in the Herman case.

Respectfully submitted,

WATTS, GENTRY & LEE,
Attorneys for Appellant."

32 And afterwards, to-wit on the 15th day of February, 1913, the Court made the following order:

"AGNES KETTLEHAKE, Respondent,
v.
AMER. CAR & FOUNDRY CO., Appellant.

Now at this day the Court having fully considered appellant's motion for rehearing, doth consider and adjudge that said motion be overruled."

And afterwards, to-wit on the 11th day of March, 1913, American Car & Foundry Company, by its attorneys, Messrs. Watts, Gentry & Lee, filed in this Court its petition for a Writ of Error to the Judges of the St. Louis Court of Appeals, praying that citation be granted to said Agnes Kettelhake, and that the bond therewith presented be approved, and that said bond and writ of error operate as a supersedeas, that the errors complained of might be reviewed by the Supreme Court of the United States and the Judgment of the St. Louis Court of Appeals be reversed:

Said petition being in words and figures as follows:

"In the St. Louis Court of Appeals,

AGNES KETTELHAKE, Plaintiff,

v.

AMERICAN CAR & FOUNDRY COMPANY, a Corporation, Defendant.

To the Honorable George D. Reynolds, Presiding Judge of the St. Louis Court of Appeals, and Hon. Albert D. Nortoni and Hon. Wm. H. Allen, Judges of said Court:

The petition of American Car & Foundry Company respectfully shows that heretofore, to-wit, on the 5th day of February, 1908, the above named plaintiff filed in the office of the Clerk of the Circuit Court of the City of St. Louis, Missouri, a petition against
33 the above named defendant, American Car & Foundry Company, William W. Eilers and Quincy Martin.

That the above named plaintiff Agnes Kettelhake is, and at all the times herein mentioned was a citizen and resident of the State of Missouri and a non resident of the State of New Jersey. That your petitioner American Car & Foundry Company, is, and at all times herein mentioned was, a corporation of the State of New Jersey and a citizen and resident of said State of New Jersey and a non-resident of the State of Missouri. That the above named defendants William W. Eilers and Quincy Martin were at all times herein mentioned and still are residents and citizens of the State of Missouri and non-residents of the State of New Jersey.

That said petition of said Agnes Kettelhake was a petition for the recovery of damages from the said defendants by reason of the death of the husband of plaintiff, said damages being laid in the sum of $10,000.00, and the said death of said plaintiff's husband being alleged by plaintiff to have been the result of the negligence of your petitioner and the said William W. Eilers and Quincy Martin while plaintiff's said husband was in the employ of your petitioner and while acting within the scope of his employment in said employ.

That said cause was tried in said Circuit Court of the City of St. Louis on the 12th and 13th days of October, 1908. That upon said trial, at the close of all the evidence offered by plaintiff against your petitioner and the said Eilers and Martin, your petitioner and the said Eilers and Martin filed separate demurrers to the evidence and the said Circuit Court of the City of St. Louis sustained the demurrer to the evidence offered by the said defendant Quincy Martin and the demurrer to the evidence offered by the defendant William W. Eilers, and overruled the demurrer to the evidence offered by your petitioner, American Car & Foundry Company.

34 That thereupon plaintiff asked leave to take an involuntary nonsuit as to said defendants Quincy Martin and William W. Eilers with leave to move to set aside the same, and leave to take said involuntary nonsuit was thereupon granted by the Court and said involuntary nonsuit, with leave to move to set the same aside was thereupon taken.

That thereupon your petitioner, American Car & Foundry Company, orally asked for time to prepare and file a petition and bond for removal of said cause to the Federal court, which time the court then and there granted.

That thereupon, before said petition for removal, and bond, or either of them, was filed, the plaintiff, by leave of court, orally moved the court to set aside the involuntary nonsuit which plaintiff had taken as to defendants Quincy Martin and William W. Eilers, which motion of the plaintiff was then and there overruled by the court.

That thereupon your petitioner filed its petition and bond in due form for the removal of said cause to the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

That thereupon the plaintiff filed a demurrer to said petition for removal of said cause to the United States court, which demurrer was then and there overruled by the court.

That thereupon the plaintiff filed her answer to said petition for removal of said cause to the United States court and thereupon the court overruled the application of your petitioner for the removal of said cause from the State to the Federal court.

That, upon said petition for removal being overruled by said court, your petitioner then and there saved its exceptions at the time.

That the trial of said cause then and there progressed and, upon its completion on the said 13th day of October, 1908, the jury returned a verdict in favor of the plaintiff, and against your petitioner, for the sum of $5400.00, and judgment was duly
35 entered on said verdict.

That thereafter your petitioner took a bill of exceptions and appealed said cause to the Supreme Court of Missouri which court then had jurisdiction of all cases pending on appeal in the courts of the State of Missouri wherein the amount involved exceeded the sum of $5,000.00, but that the jurisdiction of that court having since been changed by statute, said court, by order duly entered of record in said cause, transferred the same to the St. Louis Court of Appeals, that then being the highest court of law or equity in the said State of Missouri in which a decision could be had in said cause, and your petitioner, in said appeal assigned therein as error, the overruling of your petitioner's application for removal of said cause by the said Circuit Court of the City of St. Louis, Missouri, to the United States Circuit Court.

Your petitioner shows that the action of said circuit court, in overruling its petition for removal of said cause from the State to the Federal court, raised and presented a Federal question in said cause, namely: Whether, upon the taking, by plaintiff, of an involuntary nonsuit in said cause as to all resident defendants in said cause, the record then presented for the first time a controversy wholly between citizens of different states, to-wit: between plaintiff, a citizen and resident of the State of Missouri, and defendant, a citizen and resident of the State of New Jersey; and whether, on the record as it then stood for the first time, your petitioner was entitled

to remove said cause from the State court to the Federal court, upon filing proper petition and bond therefor.

Your petitioner alleged and contended, by its motion for a new trial and by its assignment of error and by printed and oral argument in said cause, that the action of the Circuit Court of the City of St. Louis, in hearing said cause after the taking of said
36 involuntary nonsuit by plaintiff as to the defendants Quincy Martin and William W. Eilers, and after the filing of the petition for removal and the removal bond, was repugnant to and in violation of the laws of the United States and especially of those Acts of Congress commonly called the "Removal Acts," to-wit: the acts of March 3rd, 1875, 18 Stat., 470, as amended by the Act of Congress of March 3rd, 1887, 24 Stat., 552, as corrected by the Act of Congress of August 13th, 1888, 25 Stat., 433.

That at the October, 1912, Term of the St. Louis Court of Appeals the complaint made by the said appeal and bill of exceptions, and its accompanying record, came on to be heard and was orally argued in said St. Louis Court of Appeals on the 11th day of November, 1912, and thereafter, on the 4th day of February, 1913, the said St. Louis Court of Appeals rendered its final judgment therein affirming the judgment of the trial court, namely, the Circuit Court of the City of St. Louis.

That on the 14th day of February, 1913, your petitioner filed in said court its motion for a rehearing of said cause and said motion was overruled by said court on February 15th, 1913 and no further proceedings are open to your petitioner in any State court.

Your petitioner further shows that said judgment of the St. Louis Court of Appeals was and is a final judgment of the highest court of the State of Missouri in which said judgment could be or can be had.

Your petitioner further shows that a Federal question was raised in said cause, to-wit: As hereinbefore set out, that said judgment of said St. Louis Court of Appeals was repugnant to and in conflict with the laws of the United States, and the Removal Acts of Congress, aforesaid, and there was therein drawn in question the
37 construction of statutes of the United States, to-wit, the removal acts aforesaid, and that said judgment of said St. Louis Court of Appeals was against the rights and privileges especially set up and claimed under such statutes by your petitioner, and that a decision of said Federal question was necessary to the judgment rendered by said St. Louis Court of Appeals.

Wherefore your petitioner presents herewith an exemplified transcript of the record of the St. Louis Court of Appeals, together with a certified copy of the opinion in said cause, and prays that a writ of error to said St. Louis Court of Appeals be allowed, that citation be granted and signed, that the bond herewith presented be approved, and that upon compliance with the terms of the statute in such cases made and provided the said bond and writ of error may operate as a supersedeas, that the errors complained of may be re-

viewed by the Supreme Court of the United States and the judgment aforesaid of the St. Louis Court of Appeals be reversed.

AMERICAN CAR & FOUNDRY COMPANY,
By WATTS, GENTRY & LEE,
Its Attorneys in Law and in Fact.

M. F. WATTS,
WM. R. GENTRY,
EDWIN W. LEE,
Attorneys and of Counsel for Petitioner."

38 The writ of error as prayed for in the foregoing petition is hereby allowed, this 11th day of March, 1913, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of $10,000.00.

Dated St. Louis, Missouri, this 11th day of March, A. D. 1913.

GEO. D. REYNOLDS,
Presiding Judge of St. Louis Court of Appeals of the State of Missouri.

Filed in my office this 11th day of March, A. D. 1913.

JOS. FLORY,
Clerk of St. Louis Court of Appeals of the State of Missouri,
L. M. GOCHENOUR,
Deputy Clerk.

39 And on the same day, to-wit, the 11th day of March, 1913, American Car & Foundry Company filed its Assignments of Errors in said cause, which is as follows:

"In the St. Louis Court of Appeals.

AGNES KETTELHAKE, Defendant in Error,
v.
AMERICAN CAR AND FOUNDRY COMPANY, a Corporation, Plaintiff in Error.

Assignments of Error.

Now comes said American Car and Foundry Company, plaintiff in error, and respectfully submits that in the record of the final judgment of the St. Louis Court of Appeals in the above entitled action there is manifest error in this, to-wit:

1st. The Court erred in holding that the trial court, to-wit, the Circuit Court of the City of St. Louis, did not commit error in denying defendant American Car and Foundry Company's application for removal of said cause to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

2nd. The Court erred in its construction of the Acts of Congress known as the Removal Acts, and in so construing said Removal Acts as to hold that the defendant American Car and Foundry

Company was not entitled to remove this cause to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

3rd. The Court erred in affirming the judgment against the defendant American Car and Foundry Company because the trial court in which said judgment was rendered had lost jurisdiction of said cause by the filing of an application for removal and the removal bond by defendant American Car and Foundry Company, and the action of said trial court in proceeding to finish said trial and render judgmen against said defendant was void for lack of jurisdiction of the defendant.

WATTS, GENTRY & LEE,
Attorneys for Plaintiff in Error."

40 And on the same day, to-wit, the 11th day of March, 1913, American Car & Foundry Company filed its Supersedeas Bond in said cause, which is as follows:

In the St. Louis Court of Appeals.

AGNES KETTELHAKE, Defendant in Error,
v.
AMERICAN CAR & FOUNDRY COMPANY, a Corporation, Plaintiff in Error.

Know all men by these presents, that we, American Car & Foundry Company, as principal, and National Surety Company, as surety, are held and firmly bound unto Agnes Kettelhake, in the sum of $10,000. to be paid to said obligee, her heirs, administrators and assigns, for the payment of which, well and truly to be made, we bind ourselves, our successors, legal representatives and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of March, 1913.

Whereas, the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the St. Louis Court of Appeals of the State of Missouri;

Now, Therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute the said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; *to*herwise to remain in full force and effect.

[SEAL.] AMERICAN CAR & FOUNDRY COMPANY,
By J. M. BUICK, *Vice President.*

Attest:
J. F. ROBISON, *Asst. Secretary.*

NATIONAL SURETY COMPANY, [SEAL.]
By MARK CRAWLEY,
LESLIE J. NICHOLS, *Attorneys-in-Fact.*

Signed, sealed and delivered in presence of—
G. A. ORTH.

STATE OF MISSOURI,
City of St. Louis, ss:

On this 10th day of March, 1913, before me personally appeared J. M. Buick, who, being duly sworn, deposes and says that he is Vice President of the American Car & Foundry Company, and J. F. Robison, who deposes and says that he is Assistant Secretary of said American Car & Foundry Company; that the seal affixed to the foregoing instrument is the corporate seal of said cor-
41 poration, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and the said J. M. Buick and said J. F. Robison, acknowledged said instrument to be the free act and deed of said corporation.

J. M. BUICK.
J. F. ROBISON.

Subscribed and sworn to before me this 10th day of March, 1913. My commission expires on the 13th day of March 1915.

[SEAL.] LUCIUS T. CARROLL,
Notary Public.

I hereby approve the foregoing bond and surety this 11th day of March, 1913.

GEO. D. REYNOLDS,
Presiding Judge of St. Louis Court of Appeals of the State of Missouri.

And thereafter, to-wit, on the 17th day of March the American Car & Foundry Company filed its præcepi, indicating portions of record to be incorporated into this transcript, which is as follows:

42 In the Supreme Court of the United States.

AMERICAN CAR AND FOUNDRY COMPANY, Plaintiff in Error,
v.
AGNES KETTELHAKE, Defendant in Error.

Præcipe Indicating Portions of Record to be Incorporated into the Transcript to be Sent to the Supreme Court of the United States.

To Joseph Flory, Esq., Clerk of St. Louis Court of Appeals:

Please include, in the transcript of record to be sent by you in obedience to the command of the writ of error in this case, certified copy of the entire record as found in your office, consisting of the following:

All record entries made in your Court, the certified copy of judgment and order granting appeal, mandate of the Supreme Court of Missouri transferring said cause to St. Louis Court of Appeals, opinion of Supreme Court handed down at the time of the issuance of

said mandate, printed abstract of record filed by appellant, American Car and Foundry Company, printed supplemental abstract of record filed by respondent, Agnes Kettelhake, opinion of the St. Louis Court of Appeals, affirming judgment of Circuit Court, motion for a rehearing, petition for writ of error, order allowing writ of error and supersedeas bond filed in the St. Louis Court of Appeals. In addition to all these things you will, of course, attach the original citation and the original writ of error to your transcript.

WATTS, GENTRY & LEE,
Attorneys for American Car and Foundry, Company, Plaintiff in Error.

Received copy of above præcipe this 17 day of March, 1913.

AGNES KETTELHAKE,
Defendant in Error,
By GEO. SAFFORD,
Her Attorney.

43 In the Supreme Court of Missouri, Division No. 1, October Term, 1911, January Call, 1912.

AGNES KETTELHAKE (Plaintiff), Respondent,
vs.
AMERICAN CAR & FOUNDRY CO. (Defendant), Appellant.

Appeal from the Circuit Court of the City of St. Louis, Missouri.

Hon. M. N. Sale, Judge.

Appellant's Abstract of Record.

Watts, Gentry & Lee, Attorneys for Appellant.

44 In the Supreme Court of Missouri, Division No. 1, October Term, 1911, January Call, 1912.

AGNES KETTELHAKE (Plaintiff), Respondent,
vs.
AMERICAN CAR & FOUNDRY CO. (Defendant), Appellant.

Appeal from the Circuit Court of the City of St. Louis, Missouri.

Hon. M. N. Sale, Judge.

Appellant's Abstract of Record.

The petition in the above-entitled cause was filed in the office of the Clerk of the Circuit Court of the City of St. Louis, Missouri, on February 5th, 1908. It is as follows:

45 "STATE OF MISSOURI,
City of St. Louis, ss:

In the Circuit Court in and for the City of St. Louis, Missouri, April, A. D. 1908, Term.

AGNES KETTELHAKE, Plaintiff,
vs.
AMERICAN CAR AND FOUNDRY COMPANY, a Corporation; WILLIAM W. EILERS, and QUINCY MARTIN, Defendants.

Comes now Agnes Kettelhake, the above named plaintiff, and for her first cause of action states:

That defendant, American Car and Foundry Company, is and at all times herein referred to was a corporation organized and existing under and by virtue of the laws of the State of New Jersey for the purpose of owning, controlling and operating a plant for the manufacture and repair of cars in the City of St. Louis, Missouri, and at all such times was licensed to do business in the State of Missouri as a foreign corporation, and at all such times owned and in conjunction with the defendants William W. Eilers and Quincy Martin, controlled and operated a steam locomotive, railway, switchyards and plant for the purpose of manufacturing, repairing and handling freight and passenger cars.

That on, to-wit: the twenty-third day of January, A. D. 1908, Frank Kettelhake, at all times herein referred to at and prior to his death the lawful husband of this plaintiff, Agnes Kettelhake, was in the employ of the defendants as a car repairer, and while in the employ of the defendants as aforesaid, and while acting with-
46 in the scope of his employment in repairing a car which defendants then and there in the prosecution of their said business were by said Frank Kettelhake repairing, the defendants, by negligently omitting to instruct and require their employees to so mark the cars under which the employees of defendants were working or were about to work that all persons would know whether or not persons were working under such cars, by negligently omitting to notify said Frank Kettelhake that defendants were then and there about to move a locomotive and cars against and move the car under which said Frank Kettelhake was then and there working, and by negligently omitting to discover that the said Frank Kettelhake was then and there under and repairing a car in said plant, by the servants of defendant then and there running, conducting and managing said locomotive, cars and train of cars negligently caused the wheels and truck of said car under which said Frank Kettelhake was then working, as aforesaid, to run over and injure the legs and body of said Frank Kettelhake, and thereby negligently caused said Frank Kettelhake, then the lawful husband of this plaintiff, to die on to-wit: the twenty-fourth day of January, A. D. 1908, and within six months prior to the filing of this suit.

Plaintiff further states that prior to his death the said Frank Kettelhake lived with, supported and protected this plaintiff, and

Josephine Kettelhake, who was born on the fourth day of January, 1890, Mary Elizabeth Kettelhake, who was born on the twentieth day of August, 1891, Theresa Kettelhake, who was born on the thirtieth day of August, 1894, Joseph Kettelhake, who was born on
47 the thirtieth day of November, 1896, and Anton Kettelhake, who was born on the ninth day of April, 1907, all the children of this plaintiff and said Frank Kettelhake, but that by reason of the facts aforesaid this plaintiff at all times since the death of said Frank Kettelhake, by reason of the negligence of the defendants aforesaid and as a direct consequence thereof, has been and at all times during the future will be deprived of the love, society, comfort, support and protection of the said Frank Kettelhake, and, by reason of the said negligence, has been and will be compelled to protect and support their said children until they respectively become of age.

Plaintiff further states that by reason of the facts aforesaid she has been damaged in the sum of Ten Thousand ($10,000) Dollars, for which, in accordance with the provisions of Section No. 2864 of the Revised Statutes of Missouri, 1899, as amended by an act entitled "Damages and Contributions in Actions of Tort," pages 135 and 136 of the Laws of Missouri, 1905, she prays judgment, and for her costs.

(2)

Comes now Agnes Kettelhake, the above named plaintiff, and for her second cause of action states:

That defendant, American Car and Foundry Company, is and at all times herein referred to was a corporation organized and existing under and by virtue of the laws of the State of New Jersey for the purpose of owning, controlling and operating a plant for the manufacture and repair of cars in the City of St. Louis, Missouri, and at all such times was licensed to do business in the State of Missouri as a foreign corporation, and at all such times owned and in conjunction with the defendants William W. Eilers and Quincy
48 Martin controlled and operated a steam locomotive, railway, switchyards and plant for the purpose of manufacturing, repairing and handling freight and passenger cars.

That on, to-wit: the twenty-third day of January, A. D. 1908, Frank Kettelhake, at all times herein referred to at and prior to his death the lawful husband of this plaintiff, Agnes Kettelhake, was in the employ of defendants as aforesaid, and while acting within the scope of his employment in repairing a car which defendants then and there in the prosecution of their said business were by said Frank Kettelhake repairing, the defendants, by negligently omitting to instruct and require their employees to so mark the cars under which the employees of defendants were working or were about to work that all persons would know whether or not persons were working under such cars, by negligently omitting to notify said Frank Kettelhake that defendants were then and there about to move a locomotive and cars against and move the car under which said Frank Kettelhake was then and there working, and by

negligently omitting to discover that the said Frank Kettelhake was under and repairing a car in said plant, negligently caused the wheels and truck of said car under which said Frank Kettelhake was then working, as aforesaid, to run over and injure the legs and body of said Frank Kettelhake, and thereby negligently caused said Frank Kettelhake, then the lawful husband of this plaintiff, to die on, to-wit: the twenty-fourth day of January, A. D. 1908, and within six months prior to the filing of this suit.

Plaintiff further states that prior to his death the said Frank Kettelhake lived with, supported and protected this plaintiff, and Josephine Kettelhake, who was born on the fourth day of January, 1890, Mary Elizabeth Kettelhake, who was born on the
49 twentieth day of August, 1891, Theresa Kettelhake, who was born on the thirtieth day of August, 1894, Joseph Kettelhake, who was born on the thirtieth day of November, 1896, and Anton Kettelhake, who was born on the ninth day of April, 1907, all the children of this plaintiff, and said Frank Kettelhake, but that by reason of the facts aforesaid this plaintiff at all times since the death of said Frank Kettelhake, by reason of the negligence of the defendants aforesaid and as a direct consequence thereof, has been and at all times during the future will be deprived of the love, society, comfort, support and protection of the said Frank Kettelhake, and, by reason of the said negligence, has been and will be compelled to protect and support their said children until they respectively become of age.

Plaintiff further states that by reason of the facts aforesaid she has been damaged in the sum of Ten Thousand ($10,000.00) Dollars, for which, in accordance with the provisions of Section 2865 of the Revised Statutes of Missouri, 1899, and the provisions of Section 2866 of the Revised Statutes of Missouri, 1899, as amended by an act entitled "Damages and Contributions in Actions of Tort," pages 252 and 253 of the Laws of Missouri, 1907, she prays judgment and for her costs.

GEORGE SAFFORD,
Attorney for Plaintiff."

Summons was duly issued and service was had upon all the defendants in time for the April, 1908, term of said court.

Thereafter, on April 8th, 1908, the defendant Wm. W. Eilers appeared and filed his answer in said cause, which said
50 answer, omitting caption and signature, is as follows:

"Comes now the defendant, Wm. E. Eilers, appearing for himself alone, and for answer to the petition of plaintiff filed herein denies each and every allegation in said petition contained.

Furthering answering, this defendant says that whatever injuries were sustained by the deceased, Frank Kettelhake, were caused by his own negligence directly contributing thereto in failing to pay attention to his surroundings and keep a lookout for the approach of engines and cars and failing to listen for and to heed warnings of the approach of engines and cars.

Wherefore, having fully answered, this defendant prays to be hence dismissed with his costs."

And on the same day the defendant American Car & Foundry Company appeared and filed its answer in said cause, which said answer, omitting caption and signature, is as follows:

"Comes now the defendant, American Car and Foundry Company, appearing for itself alone, and for answer to the petition of plaintiff filed herein denies each and every allegation in said petition contained.

Further*ing* answering, this defendant says that whatever injuries were sustained by the deceased, Frank Kettelhake, were caused by his own negligence directly contributing thereto in failing to pay attention to his surroundings and keep a lookout for the approach of engines and cars and failing to listen for and to heed warnings of the approach of engines and cars.

Wherefore, having fully answered, this defendant prays to be dismissed with its costs."

And on the same day the defendant Quincy Martin ap-
51 peared and filed his answer in said cause, which said answer, omitting caption and signature, is as follows:

"Comes now the defendant, Quincy Martin, appearing for himself alone, and for answer to the petition of plaintiff filed herein denies each and every allegation in said petition contained.

Further*ing* answering, this defendant says that whatever injuries were sustained by the deceased, Frank Kettelhake, were caused by his own negligence directly contributing thereto in failing to pay attention to his surroundings and keep a lookout for the approach of engines and cars and failing to listen for and to heed warnings of the approach of engines and cars.

Wherefore, having fully answered, this defendant prays to be hence dismissed with his costs."

Thereafter, on the 11th day of April, 1908, the plaintiff filed her separate replies to the answers of the various defendants, each of which replies consisted of a general denial of the facts set out in the answers of the respective defendants, and a prayer for judgment in accordance with plaintiff's petition.

Thereafter, on the 12th day of October, 1908, it being one of the days of the October Term, 1908, of said court, said cause came on for trial before the Honorable Moses N. Sale, Judge of said court, and a jury, and not being completed on said day the said trial was resumed and completed on the 13th day of October, 1908, it being one of the days of said October, 1908, term of said court.

During said trial, and on said 13th day of October, 1908, the plaintiff filed an amended petition, which amended petition is as follows:

52 "STATE OF MISSOURI,
City of St. Louis, ss:

In the Circuit Court in and for the City of St. Louis, Missouri, October Term, 1908.

Room 5. No. 51928.

AGNES KETTELHAKE, Plaintiff,
vs.
AMERICAN CAR AND FOUNDRY COMPANY, a Corporation, WILLIAM W. EILERS, and QUINCY MARTIN.

Comes now Agnes Kettelhake, plaintiff in the above entitled cause, and leave of court first having been obtained, files this her amended petition and for her first cause of action states:

That defendant, American Car and Foundry Company is and at all times herein referred to was a corporation organized and existing under and by virtue of the laws of the State of New Jersey for the purpose of controlling, owning and operating a plant for the manufacture and repair of cars in the City of St. Louis, Missouri, and at all such times was licensed to do business in the State of Missouri as a foreign corporation, and at all such times owned and in conjunction with the defendants William W. Eilers and Quincy Martin, ran, conducted, managed, controlled and operated a steam locomotive, railway, switchyards and plant for the purpose of manufacturing, repairing and handling freight cars and passenger cars.

That Frank Kettelhake was at all times herein referred to at and prior to his death the lawful husband of this plaintiff, Agnes Kettelhake, and was at all such times in the employ of the
53 defendants as a car builder, worker and repairer, and while said Frank Kettelhake was in the employ of defendants as aforesaid, and while he was acting within the scope of his employment in tightening the nuts of bolts upon and of a car which defendants then and there in the prosecution of their said business were by said Frank Kettelhake finishing, building and preparing, the defendants, by their agents and servants, ran, conducted, managed, controlled and operated the steam locomotive and freight cars herein referred to and by their servants and agents by which said steam locomotive and cars were run, controlled, managed and operated as aforesaid, negligently caused and permitted said steam locomotive and cars to so move that several of said cars ran against, and moved another of said cars which the said Frank Kettelhake was then and there dangerously near and repairing and thereby on, to-wit: the twenty-third day of January, A. D. 1908, negligently caused said car which the said Frank Kettelhake was then and there dangerously near and working under, about and upon as aforesaid, and the wheels and truck thereof, to run over and upon the legs and body of the said Frank Kettelhake and injure the said Frank Kettelhake so severely that by reason thereof the said Frank Kettelhake died on to-wit: the twenty-fourth day of January, A. D. 1908,

and plaintiff further states that it was the duty of the defendants by the servants and agents of the defendants then and there running, conducting, managing, controlling and operating said locomotive and cars to exercise ordinary care to not cause or permit said steam locomotive and cars and especially the car which the said Frank Kettelhake was dangerously near and working about, under and upon as aforesaid, to move without first exercising ordinary care to discover and notify the said Frank Kettelhake, in time for the said Frank Kettelhake to reach a place of safety and avoid injury, that said cars were about to be moved and plaintiff further states that the defendants and the servants and agents of defendants then and there running, conducting, managing, controlling and operating said steam locomotive and cars by the exercise of ordinary care might have known in time to avert the injuries herein described by the exercise of ordinary care that said Frank Kettelhake was tightening nuts of and working under, about and upon and was dangerously near one of said cars and in danger of being injured and killed by moving said car if said car was moved without notice to the said Frank Kettelhake, and plaintiff further states that the defendants by their servants and agents then and there running, conducting, managing, controlling and operating said locomotive and freight cars failed and neglected to exercise ordinary care to discover the said Frank Kettelhake and to notify him that said cars were about to be and would be moved.

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Plaintiff further states that prior to his death the said Frank Kettelhake lived with, supported and protected this plaintiff, and Josephine Kettelhake, who was born on the fourth day of January, 1890; Mary Elizabeth Kettelhake, who was born on the twentieth day of August, 1891, Theresa Kettelhake, who was born on the thirtieth day of August, 1894; Joseph Kettelhake, who was born on the thirtieth day of November, 1896, and Anton Kettelhake, who was born on the ninth day of April, 1907, all the children of this plaintiff and said Frank Kettelhake, but that by reason of the facts aforesaid this plaintiff at all times since the death of said Frank Kettelhake, by reason of the negligence of the defendants aforesaid and as a direct consequence thereof, has been and at all times during the future will be deprived of the support of the said Frank Kettelhake, and, by reason of the said negligence, has been and will be compelled to protect, educate and support their said children until they respectively become of age.

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Plaintiff further states that by reason of the negligence of the defendants aforesaid she has been damaged in the manner aforesaid in the sum of ten thousand dollars, for which, in accordance with the provisions of Section No. 2864 of the Revised Statutes of Missouri, 1899, as amended by an act entitled "Damages and Contributions in Actions of Tort," pages 135 and 136 of the Laws of Missouri, 1905, she prays judgment, and for her costs.

(2)

Comes now Agnes Kettelhake, plaintiff in the above entitled cause, and for her second cause of action states:

That defendant, American Car and Foundry Company is and at all times herein referred to was a corporation organized and existing under and by virtue of the laws of the State of New Jersey, for the purpose of controlling, owning and operating a plant for the manufacture and repair of cars in the City of St. Louis, Missouri, and at all such times was licensed to do business in the State of Missouri as a foreign corporation and at all such times owned and in conjunction with defendants William W. Eilers and Quincy Martin ran, conducted, managed, controlled and operated a steam locomotive, railway, switchyards and plant for the purpose of manufacturing, repairing and handling freight cars and passenger cars.

56 That Frank Kettelhake was at all times herein referred to at and prior to his death the lawful husband of this plaintiff, Agnes Kettelhake, and was at all such times in the employ of defendants as a car worker and repairer, and while said Frank Kettelhake was in the employ of defendants as aforesaid, and while he was acting within the course and scope of his employment in working about, under and upon and nutting up a car which defendants then and there in the prosecution of their said business were by said Frank Kettelhake, in preparing, finishing and nutting up, the defendants negligently caused and permitted a steam locomotive and a number of freight cars to move against and move another car which the said Frank Kettelhake was then and there near and working about, under, upon and nutting up, and thereby on, to-wit: the twenty-third day of January, A. D. 1908, negligently caused said car which the said Frank Kettelhake was then and there near and working upon, under, about and nutting up as aforesaid, and the wheels and truck thereof to run upon and over the legs and body of the said Frank Kettelhake, and injure the said Frank Kettelhake so severely that by reason thereof the said Frank Kettelhake died on to-wit: the twenty-fourth day of January, A. D. 1908, and plaintiff further states that it was the duty of defendants to exercise ordinary care to not cause or permit the said car which the said Frank Kettelhake was near and working about, under and upon as aforesaid, to move without first exercising ordinary care to discover and notify the said Frank Kettelhake in time for the said Frank Kettelhake to reach a place of safety and avoid injury, that said cars were about to be moved, and plaintiff further states that

57 the defendants by the exercise of ordinary care might have known, in time to avert the injuries herein described, by the exercise of ordinary care that said Frank Kettelhake was working about, under, upon and nutting up and was near one of said cars and in danger of being injured and killed by moving said car if said car was moved without notice to the said Frank Kettelhake, and plaintiff further states that the defendants failed and neglected to exercise ordinary care to discover said Frank Kettelhake and notify him that said cars were about to be moved and prevent said cars from moving and injuring plaintiff, and plaintiff further states that said Frank Kettelhake did not know and could not by the exercise of ordinary care have known that the car which

he was near and working under, about, upon and nutting up was likely to be or was being moved until it was too late for him to avert his injuries by the exercise of ordinary care on his part.

Plaintiff further states that prior to his death the said Frank Kettelhake lived with, supported and protected this plaintiff and Josephine Kettelhake, who was born on the fourth day of January, 1890; Mary Elizabeth Kettelhake, who was born on the twentieth day of August, 1891; Theresa Kettelhake, who was born on the thirtieth day of August, 1894, Joseph Kettelhake, who was born on the thirtieth day of November, 1896, and Anton Kettelhake, who was born on the ninth day of April, 1907, all the children of this plaintiff and said Frank Kettelhake, but that by reason of the facts aforesaid this plaintiff at all times since the death of said Frank Kettelhake, by reason of the negligence of the defendants aforesaid and as a direct consequence thereof, has been and at all times during the future will be deprived of the support of the said Frank
58 Kettelhake, and, by reason of said negligence, has been and will be compelled to protect, educate and support their said children until they respectively become of age.

Plaintiff further states that by reason of the negligence aforesaid of defendants she has been damaged in the manner aforesaid in the sum of ten thousand dollars, for which, in accordance with the provisions of Section 2865 of the Revised Statutes of Missouri, 1899, and the provisions of Section 2866 of the Revised Statutes of Missouri, 1899, as amended by an act entitled "Damages and Contributions in Actions of Tort," pages 252 and 253 of the Laws of Missouri, 1907, she prays for judgment and for her costs.

GEORGE SAFFORD,
Attorney for Plaintiff."

Thereupon the defendants filed a motion to require the plaintiff to elect upon which cause of action stated in the first count of her amended petition, the plaintiff would proceed to trial, which said motion is as follows, omitting caption and signatures:

"Come now the defendants in the above-entitled cause and move the court to make an order requiring the plaintiff to elect upon which cause of action, stated in the first count of her amended petition she will proceed to trial, and for ground for this motion these defendants say that in the first count of the amended petition filed by plaintiff on the 13th day of October, 1908, she pleads more than one cause of action against the defendants, which causes of action should be stated in separate counts.

Wherefore, these defendants move the court to require the plaintiff to elect upon which cause of action, so stated in said first count of her amended petition, she will proceed to trial."

59 And at the same time the defendants filed a motion to require the plaintiff to elect upon which cause of action stated in the second count of her amended petition she would proceed to trial, which said motion, omitting caption and signature, is as follows:

"Come now the defendants in the above-entitled cause and move

the court to make an order requiring the plaintiff to elect upon which cause of action, stated in the second count of her amended petition, she will proceed to trial, and for ground for this motion these defendants say that in the second count of the amended petition filed by plaintiff on the 13th day of October, 1908, she pleads more than one cause of action against the defendants, which causes of action should be stated in separate counts.

Wherefore, these defendants move the court to require the plaintiff to elect upon which cause of action, so stated in said second count of her amended petition, she will proceed to trial."

Both of said motions were confessed by plaintiff.

Thereupon the defendants, by leave of Court, withdrew their answers and refiled them as answers to plaintiff's amended petition.

Thereupon the plaintiff, by leave of Court, withdrew her replies and refiled them as replies to defendants' answers to plaintiff's amended petition.

Thereupon the trial progressed and at the conclusion of the evidence offered by the plaintiff, the defendants having filed separate demurrers to the evidence, the Court sustained the demurrer to the evidence offered by defendant Quincy Martin and the demurrer to the evidence offered by defendant William W. Eilers, and overruled the demurrer to the evidence offered by defendant American Car & Foundry Company.

60 Thereupon plaintiff asked leave to take an involuntary non-suit as to defendants Quincy Martin and William W. Eilers, with leave to move to set aside the same, and leave to take said non-suit was granted by the court and said involuntary non-suit with leave to move to set same aside was taken:

Thereupon the defendant American Car & Foundry Company orally asked for time to prepare and file a petition and bond for removal from the State to the Federal Court, which time the Court then and there granted;

Thereupon before said petition for removal and bond or either of them was filed, plaintiff, by leave of Court, orally moved the court to set aside the involuntary non-suit which plaintiff had taken as to Quincy Martin and William W. Eilers, which motion of plaintiff was then and there overruled, to which ruling of the court plaintiff then and there saved her exceptions at the time;

Thereupon the defendant, American Car & Foundry Company, filed its petition for removal and bond;

Thereupon plaintiff filed her demurrer to said petition for removal, which said demurrer was then and there overruled by the court, to which ruling of the court plaintiff then and there saved her exceptions at the time;

Thereupon plaintiff filed her answer to said petition for removal;

Thereupon the court overruled said petition for removal from the State to the Federal Court, to which ruling of the court defendant, American Car & Foundry Company, then and there saved its exceptions at the time.

The trial thereupon progressed. At the close of all the
61 evidence plaintiff dismissed as to the second count of her amended petition. The trial was completed on the said 13th day of October, 1908, and on said last-mentioned day, and at said October, 1908, Term of said court, the jury returned a verdict in favor of the plaintiff, and against the defendant, American Car & Foundry Company, on the first count of the petition for the sum of $5,400.00 and judgment was duly entered on said verdict.

Thereafter, on the 16th day of October, 1908, it being one of the days of the October, 1908, term of said court, the plaintiff filed separate motions to reinstate the cause upon the docket as to the first count of her amended petition, as to the defendants Quincy Martin and William W. Eilers, and to set aside the non-suits and grant her a new trial as to said defendants.

Thereafter on the 17th day of October, 1908, it being one of the days of the October, 1908, term of said court, the defendant American Car & Foundry Company filed its motion for a new trial.

Thereafter, on the 22nd day of December, 1908, it being one of the days of the December, 1908, term of said court, the court overruled the motion of defendant American Car & Foundry Company for a new trial, and the separate motions of plaintiff to reinstate said cause, set aside the non-suits and grant a new trial, as to defendants Quincy Martin and William W. Eilers.

Thereafter, on January 6th, 1909, it being one of the days of the December, 1908, term of said court, the defendant American Car & Foundry Company deposited $10.00 with the clerk as a docket fee for use in the Supreme Court and filed its application, duly supported by affidavit, praying an appeal of said cause to the Supreme Court of Missouri, which appeal was thereupon allowed by the
62 court.

And at the same time the court made an order duly entered of record in said cause granting the defendant American Car & Foundry Company until and including January 26th, 1909, to file its appeal bond in the sum of $11,000.00 and until February 5th, 1909, to file its bill of exceptions in said cause.

Thereafter, on January 5th, 1909, the appeal bond of said defendant American Car & Foundry Company, was filed and approved.

Thereafter, on the 28th day of January, 1909, it being one of the days of the December, 1908, term of said court, the plaintiff was granted 60 days from that date in which to file her bill of exceptions, and on the same day filed her application, supported by affidavit, praying for appeal and her appeal was allowed by the court to the Supreme Court of Missouri, from the judgment or decision of the court as to the defendant Quincy Martin, upon the first count in her amended petition.

Thereafter on February 2nd, 1909, the court by order duly entered of record in said cause granted the defendant American Car & Foundry Company until and including March 5th, 1909, in which to file its bill of exceptions in said cause.

And thereafter, on the 3rd day of March, 1909, it being one of the days of the February, 1909, term of said court, the court, by

order duly entered of record in said cause, granted the defendant American Car & Foundry Company until and including March 15th, 1909, to file its bill of exceptions in said cause.

Thereafter on the 15th day of March, 1909, it being one of the days of the February, 1909, term of said court, by stipulation of counsel filed in said cause the defendant American Car & Foundry Company's time for filing its bill of exceptions in said cause
63 was extended until and including the 1st day of April, 1909, and the time of the plaintiff for filing her bill of exceptions in said cause was, by said stipulation, extended until and including the 1st day of April, 1909.

Thereafter on the 1st day of April, 1909, it being one of the days of the February, 1909, Term of said court, plaintiff and the defendant American Car & Foundry Company presented in open court, their joint bill of exceptions in said cause, which joint bill of exceptions was thereupon signed by the Judge of said court and was, by order duly entered of record in said cause, approved, allowed, filed and made a part of the record in said cause. Said bill of exceptions is set forth in abstract below. It is as follows:

In the Circuit Court in and for the City of St. Louis, Missouri.

AGNES KETTELHAKE, Plaintiff,

vs.

AMERICAN CAR & FOUNDRY COMPANY, a Corporation, and WILLIAM W. EILERS and QUINCY MARTIN, Defendants.

Be it remembered. That at the October Term, A. D. 1908, of the Circuit Court of the City of St. Louis, Missouri, and on the 12th day of October in said term this cause came on for hearing before the Honorable Moses N. Sale, Judge of said Court, and a jury in Division No. 5 thereof, and the following proceedings were had, to-wit:

Appearances:

George Safford, Attorney for Plaintiff.
64 McKeighan & Watts and William R. Gentry, Attorneys for Defendants.

The plaintiff to support the issue upon her behalf introduced the following evidence.

Mr. SAFFORD: Omitting the stipulation and omitting the formal parts of this deposition, I will proceed to read you the deposition of Nick Anastas. We took his deposition before he went away and this is his testimony.

NICK ANASTAS, being duly sworn, on oath says:

My name is Nick Anastas. I live on the third floor of 2829 De-Kalb street. Have lived here nine months. I work as a laborer for the American Car & Foundry Company at the car shops. On January 23d I was staying in the house. Demetrius Stargio came along. A man was at the car shop at work. I saw the man that was hurt and

hollered in the house, and then I went down. I don't know the name of the man who was hurt. I saw him by a freight car. Three cars were on that track about three days. At four o'clock I saw the man who was hurt. I was at the window looking out. I saw a train come along and a man lying down and making his hands go and hollering. I did not see the man till he was lying there hollering. I saw the man standing close to car. Didn't see him working and machine came along and threw him to the ground. The man was standing at a corner of the car. The train caught him. I don't know whether he was between or outside of the rails. When I first saw the man he was looking south. The cars moved from the south. The tracks run north and south. Before the car hit the man the man was standing there. I did not see him under the car. I only
65 saw him just as he was hit and he was standing too close to the car, right close to the car so he could touch it. I didn't see the man's hands doing anything. The man fell on west side of the car. I saw him by the corner of the car. The train left those cars down there. There were three cars first and then six cars came down there. I went to tell Sam Caporal and then came back to my room and stayed all night there. Demetrius Stargio has gone back to the old country.

T. P. RANDOLPH, of lawful age, testified as follows:

Direct examination by Mr. SAFFORD:

My name is T. P. Randolph. I am forty-six years of age, my occupation is gateman at Bixby, Illinois. I am married. On the 23d day of January, 1908, I was watchman for the American Car & Foundry Company on the south side of the yard. I know Mr. Cowell. He was engineer at that time running the engine for the American Car & Foundry Company and the engine was owned, operated and controlled by that company for the purpose of switching cars in and off of the freight repair tracks. The crew doing the switching was in charge of foreman, Quincy Martin. He was foreman of the engine. There were two helpers, but there was only one there at that time. The other helper was firing the switch engine. Alex. Slater was doing the switching, following the engine along. John Tice was firing the engine in place of the fireman. Quincy Martin was foreman of the engine. Mr. Eilers had charge of the gang working on the car. He had a gang at work there. He was in the employ of the American Car & Foundry Company. I did not know Frank Kettelhake. I was told afterwards that this man I describe was him,
66 but I never knew him. The switching crew pulled out of the shed with nine cars, to the best of my knowledge, and backed two of them in on track one and this man and the man Slater was the only man on the engine and he pulled down to the switch and I told him I would take care of that as he had to go on to the next one; and he went away down to the switch—to the gate and backed up opposite the gate I was watching, and they had seven cars and he was on the fourth car from the rear or fourth from the front in the middle and he stood there possibly five minutes and he got a signal to back up. Slater got the signal to back up. He was

on the fourth car from the engine or on the fourth car from the rear. There was seven cars. That would be three from either way then. Slater got the signal from Quincy Martin. Martin came back from around the curve and I saw him give that signal. Slater then repeated the signal to the engineer who backed up these seven cars. When the cars and engine backed up they went around the curve out of my sight. I saw them no more. I cannot say that I heard any noise when they bumped. I don't recollect exactly how long it took them to go down there and back. It would usually take them about ten minutes to go down there and back unless they had some extra work to do. (Plaintiff's counsel here exhibited a photograph to the stenographer, which is marked by the stenographer Exhibit A for identification). That is the picture of the American Car & Foundry yard on the south side. It is a correct picture of the location with the exception of one thing; it looks like there was more lumber over here (indicating on photograph) on the south side of the gate. That is the part that is constantly changing, they added more lumber to that.

67 This plant here faces north and south. It runs with the river. I call it north and south. The Iron Mountain shed runs north and south here (indicating on photograph). The side of the picture marked "S" is what I ordinarily call south down there and the side marked "N" is north, "E" is what I understand to be east down there and the part marked "W" is what I understand to be west.

(Plaintiff here offers in evidence said photograph, Exhibit A, and the same is called for in the bill of exceptions. It is found on page 97 of this abstract.)

Witness points out the lumber yard and the crane where they unload lumber and load it on the cars. That is the electric crane they have for carrying it.

A second photograph is produced by plaintiff's counsel and marked Exhibit B by the stenographer. On this Exhibit B the points of the compass are designated by the N, W, E and S.

(Plaintiff's counsel here offers in evidence said photograph Exhibit B. Said photograph is called for in the bill of exceptions. It is found on page 99 of this abstract.)

A third photograph is produced by plaintiff's counsel and marked Exhibit C by the stenographer. The witness identifies this as a correct picture of the premises in question and the points of the compass are properly marked on its face.

(Plaintiff's counsel here offers in evidence said Exhibit C. It is called for in the bill of exceptions at this point and is found on page 101 of this abstract.)

A fourth photograph is here produced by plaintiff's counsel and is identified by the witness as a correct picture of the American Car & Foundry Company's yards as they were at the time in ques-

68 tion. Witness says the directions are correctly marked on this photograph also.

(Plaintiff's counsel here offers in evidence said photograph Ex-

hibit D and the same is called for at this point in the bill of exceptions. It is found on page 103 of this abstract.)

Another photograph is here shown the witness and is marked Exhibit E.

It is a correct representation of the west side of the Car & Foundry yards as they appeared at the time of the accident. There are the two houses there (indicating on photograph). The letters on the margin of the picture correctly indicate the directions.

(Said photograph is here offered in evidence and is called for at this point in the bill of exceptions. It is found on page 105 of this abstract.)

The street shown just outside of the fence in photograph Exhibit A is De Kalb street. I think the boards in the fence shown in this photograph are eight-foot boards, at least. There are wires on top of the fence there. These little posts here have wires on them (indicating on photograph). The wires are perhaps eighteen inches above the planks. I don't know that there was any way for a man to get into the plant on the De Kalb street side. There were no gates on that side. You are supposed to go around to the office, to the gateway. I was at the lower gateway. For the purposes of the working men there was supposed to be only one gate at 2800 De Kalb street. That was a square or two from where the word "Young" is marked on photograph Exhibit A. It is impossible for me to show on Exhibit A, where I was when I saw Quincy Martin signal the train to back. I was over beyond the extreme right of the
69 picture. That gate is the gate that opens next to the Iron Mountain tracks on what you generally call the east side of the yard and next to the building. From that gate over to where the letter "X" is marked on Exhibit A is one hundred yards or better. From where I was standing I could not see where Frank Kettelhake was injured. The curve prevented me. There was a good deal of lumber at that time between me and the curve, but I couldn't have seen that anyway. It is such a sharp curve—it shoots almost due west.

Cross-examination by Mr. GENTRY:

I was about at the gate over there beyond the right of this picture when I saw the train stop. At that time Mr. Slater was up on top of the train about the middle and the engineer and the man acting as fireman were on the engine. The only other man connected with the crew at that time was Quincy Martin. I saw the train pull up at that point and stop.—the fourth car stood right in the gateway. That was the gate where I was. There were three cars on the south and three cars on the north. That is the position it stood in when Martin went around the curve and then came back. Martin left the train standing down there at the extreme right of this picture. Martin was some distance away from the engine when it stopped at my gate, about four or three car lengths. When the train stopped at my gate at the time Martin was two or three car lengths north of it. I don't know where Martin went. The last I saw of him he started around the curve on that track. I put the figure one on the photo-

graph Exhibit A at the point where Martin was when he started across. He came around this curve here. That is quite a curve. I can't say whether at that time there were three cars standing
70 over near this west fence. I don't know. I couldn't see whether Martin went as far as those cars or not. All I know is I lost sight of him as he went around the curve. But what he did when he got around there and what he said, I don't know. He came back up pretty near up to this mark one on this photograph "A." That would be about six or seven car lengths from the man that was on the third car from the engine, that is to say, it would be about six car lengths from Slater. The engine was then headed towards the south. There were three cars between Slater and Martin and then some more space. I saw Martin at the time he gave the signal to go ahead and I remarked to Slater "Give the signal to back up," and the train as it was then constituted with about seven cars, backed on until it reached the curve and went around the curve towards the west, and that is the last I saw of the train, and I don't know how far it went after that until it stopped. I don't know what any member of the train crew did after they went around curve. From the time I saw Martin signal Slater and Slater signal the Engineer I don't suppose the train went over two or three miles an hour until the engine got out of sight. They would not dare to go any faster than a walk. It was what you call "yard speed" in that place there. From the time the signal was given by Martin to Slater and repeated by Slater to the engineer, I don't recollect of the engine stopping in my sight. Of course, there was quite a pile of lumber there that obstructed my view. As far as I could see the engine did not stop. I mark the letter "Y" on the photograph Exhibit A, at the point where the engine vanished from my view. That is about as near as I can get to it, I guess. That is pretty well into the curve. (Exhibit D is shown the witness.) I mark
71 the letter "Y" on Exhibit D where the engine was as it left my view. It was right about at the point of the switch. There is where it left my sight. The engine first had nine cars and they put off two of the cars on track No. 1. Here is track No. 1. Counsel writes "one" on the track I have designated as track No. 1 on Exhibit D. That is the track on which I helped him to place two cars. Track No. 1 runs along nearest the fence. The spur shown on the photograph is the one that goes down to the saw mill. That is inside of the yard. I don't know the number of the track around the curve. I don't know anything about those tracks. They run eight, nine and ten, but I don't know anything about them and I don't know which is eight, nine or ten. I judge it is about fifteen car lengths from the point marked "Y" on Exhibit A around this switch to the end of the track by that west fence. I don't know how many car lengths it is. I have been there once or twice but not on the ground to do any switching.

It is about ten or twelve car lengths from the gate where I stood up to the point "Y" where I say I lost sight of the engine. It is about fifteen car lengths from "Y" over around the curve to the west end.

Counsel for plaintiff here reads the following stipulation, which was entered into for the purpose of saving the trouble of having a physician to come down to show the cause of the death of Mr. Kettelhake. The stipulation bears the title of the cause and is signed by counsel for defendants and is as follows:

"It is hereby admitted by the defendants in the above case that Frank Kettelhake died as the result of injuries received by him on the 23rd day of January, 1908, in the yards of the American Car & Foundry Company."

72 NICK CAPORAL, being duly sworn, testified as follows:

Direct examination by Mr. SAFFORD:

My Name is Nick Caporal. I live at 144 Dorcas street. I am an interpreter for the Albanian language. I know Nick Anastas, whose deposition was read by plaintiff's counsel in this case. I was present at the taking of that deposition. At that time Nick Anastas lived on the third floor at 2829 De Kalb street. I can point out on Exhibit E the place where Anastas lived at that time (witness points it out on the photograph.) (The letter "G" is here marked by the window of the room where Anastas lived. It is here admitted that when Anastas said "machine" he meant locomotive and cars.)

SAM CAPORAL, being duly sworn, testified as follows:

Direct examination by Mr. SAFFORD:

My name is Sam Caporal. I live at 144 Dorcas street. I was living in my store on the 23rd of January, 1908, that is a grocery store that I keep. I know Nick Anastas. I saw him on the 23d day of January, 1908. He came to see me about four o'clock in the afternoon on the 23d of January, 1908. He ran to me. When Anastas got to me I stayed in the store. I ran to the office of the American Car & Foundry Company. It took me two or three minutes from the time Anastas first got to me to get to the office of the American Car & Foundry Company, it was about two blocks away. I ran there. I went to the office and I tell the man there is a man killed. They came with me then, just one man, I don't know
73 his name, to see the man. I stayed in the office of the American Car & Foundry Company about a minute. From the office of the American Car and Foundry Company in four or five minutes we go to see him. We don't know exactly where to go. We go in the car shops. I mean inside the building. From there we went outside into the yard. I recognize this place in photograph Exhibit A. I don't remember what track we went to. It was the big track they put big cars on. We found the man by the third car from the fence shown on Exhibit A. I don't know the number of feet. It was about twice the length of this room. About three car lengths. He was lying by the third car from the west end, that is, from the fence. (Witness draws a mark on the track to represent car, they are numbered one, two and three. No. 1 is close to the fence. No. 2 is the second from the fence and No. 3 is the third from

the fence.) I put the mark "X" right where I found the deceased. He hollered. He was lying down. I think he was about two feet from the rail of the track. It was about six or seven minutes from the time Nick Anastas first got to me until I got to where the man was hurt. I don't know how many cars were on the track there at the time. I seen more than I counted. I seen those three I have described. I saw others besides those. The others were on the east side of the three. They were on the same track. I don't know who the man was that went with me but I got him from the office of the American Car and Foundry Company. I don't know who the man was that was hurt. The engine was not there at the time that I got there. I did not see it.

74 J. M. SCOTT, being duly sworn, testified as follows:

Direct examination by Mr. SAFFORD:

My name is James Scott. I am forty-five years old. I am foreman of the shipping department of the American Car & Foundry Company. I held that same position on the 23rd of January, 1908. My residence is 137 Dorcas street. I was on the shipping track when Frank Kettelhake was injured. I did not know he was hurt until two hours after he was hurt. He was working at piece work for Bill Eilers. He was working on track No. 12. I don't know whether he was working there when he was injured or not. Walter Cowell was running the switch engine on that day for the American Car & Foundry Company and Frank Slater was in the employ of that company. He was working with Quincy Martin. Alex. Slater and Tice were also in the crew. Tice was fireman. Slater was doing the switching. Martin was foreman of the crew and attended to his business as usual. I was outside. I was attending to my business, taking care of my men. It was the business of the foreman of the switching crew to look after the putting of cars on the repair track and taking them off under my instructions. The switching crew, Cowell, Tice, Slater and Martin were in the employ of the American Car & Foundry Company and subject to my orders. The track referred to is not a repair track, it is an unloading track. They do not very often repair any cars on that track. It was used ordinarily for all materials in there and to unload them for use in the yards and not as a repair track ordinarily. We have about fifteen or twenty repair tracks down there. Kettelhake might have followed that car up there. I don't know anything about that. I didn't see the cars over there at all. Sometimes these men
75 follow the cars up. They are liable to follow the cars up and work on them wherever they stop at.

Cross-examination by Mr. GENTRY:

I don't know what was done that day.

WM. F. BADE, being duly sworn, testified as follows:

Direct examination by Mr. SAFFORD:

My name is William F. Bade, age forty-nine years; I am clerk in the American Car & Foundry Company and I am still in the employ of that Company. I knew Frank Kettelhake. He was in the employ of the American Car & Foundry Company on the 23rd of January, 1908. I was engaged at the office at 2800 DeKalb street as a clerk on the day that he was injured. Kettelhake was paid seventeen cents per hour by the American Car & Foundry Company. I was in the office when Sam Caporal came in on the day of this accident. He came in with another party and they were very much excited and stated there was a man hurt in the lumber yard run over by some cars in the lumber yard and that he was hurt. Then he and the chief clerk and the piece-worker went down and brought Kettelhake up. After the men found out he was hurt they went right down there. It was only a few minutes from the time Caporal came into the office until they went out to get the man. I did not go down with them to find him. I was not down there while they were getting him. They brought him to the office. He was brought up on a stretcher and he was bandaged. His legs were tied up to stop any more bleeding. The stretcher was made of canvas and several bars of wood. It was not
76 a regular stretcher but it was made for that purpose. It was about four o'clock when they brought him into the office. I was sent down to get a statement, and I saw Quincy Martin when I went down towards the engine to take the statement. I found him in the engine. I took his statement. They bandaged Mr. Kettelhake up, called for an ambulance and sent him to the hospital.

Cross-examination by Mr. GENTRY:

I couldn't say that Mr. Kettelhake was nearly frozen. He was chilled, but he wasn't frozen. He wasn't stiff.

Redirect examination by Mr. SAFFORD:

Walter Cowell, Martin, Tice and Slater were on the American Car & Foundry Company's payroll at that time.

The court here took a recess until two o'clock at which time it reconvened.

FRANK GEORGE, being unable to speak the English language, was sworn through an interpreter and testified as follows:

I don't know what time of day Kettelhake was hurt. It was in the afternoon sometime. I had been working on a box car. There are many tracks there, I don't know the tracks. I saw Frank Lechner after I came from the machine shop with my partner. My partner asked him where he was going and he said he was going to the backhouse, the toilet. We were then in the machine shop and this man came over from there and went to the toilet. I can't tell how far I was from the cars when this man told me he was going

to the toilet. Me and my partner left Lechner at a box car.
77 When we left we seen him at the box car. He was working on the bottom. He was working with his partner. His partner was that fellow that was killed. I don't know whether we said anything to him about the time or not. I didn't see his watch. We were through work and we left the place down there. None of us said anything to Lechner about what time it was. We went to the machine shop. I am not sure whether there were three or four cars there on the track when my partner Steve Hango and I spoke to this man and his partner. I can't tell whether other cars were moved onto that track later that afternoon. It was no more than fifteen minutes—ten or fifteen minutes—after my partner and I left Mr. Lechner and his partner that I learned that Mr. Lechner's partner had been hurt by the car. Some men went down there. They hollered about it, and I heard about the man that was killed down there. I don't see him though. I just heard that he was killed. My partner seen him. Steve Hango is working with me and lives with me now. His address is the same as mine, 2452 DeKalb street. I don't know where Hango is working now. He is working for a railroad as a laborer with a shovel and a pick. He is in St. Louis, Missouri. We were out by the factory. We were in the machine shop when we heard about his being hurt. I was in the machine shop marked "D" on photograph Exhibit A. We just took hold of everything that we used and we went into the machine shop. We got some bolts and we went in the machine shop, me and my partner.

Cross-examination waived.

FRANK LECHNER, being duly sworn, testified as follows:

78 Direct examination by Mr. SAFFORD:

My name is Frank Lechner, I am thirty-three years old. I am married and live at 3319 Kosciusko. On January 23d, 1908, I was living at 169 Dorcas street, and was working for the American Car & Foundry Company. I was doing what they called "working bottoms." This is fastening nuts on the bottoms of these box cars. I was finishing new box cars. I worked all day that day with Frank Kettelhake. I guess I had known him about two or three weeks. I never knew anything much about his sobriety. I never saw him drinking or drunk or anything of that kind. He worked steady. He worked about ten hours a day. I know where he lived, but I don't know his address exactly. I saw Steve Hango and this man Frank George there that afternoon. Before I left Kettelhake they left a little before I did. That is when I went to the toilet. They were working on one end of the car and we were working on the other. When I say "we" I mean Frank Kettelhake and me. They were doing the same kind of work we were, tightening up nuts on the bottoms of the cars. They did not come over to my end of the car. The only thing they said, when they were pretty near finished they asked me what time it was. I told them five

minutes after four. I looked at my watch before I told them. After they finished they left. It was maybe two or three minutes after they asked me the time until they finished. I don't know exactly. I didn't take notice where they went, but I know they went east along the side of the track. I stayed there two or three or four minutes after they left. I can't say right to the minute. I never stayed there but a few minutes. It was not over ten minutes. Kettelhake and I were working on the west end
79 of the car. That is the car towards the fence. I was working on the south side and he was working on the north side of the car. We were working under the car on the bottom. I was between the center and the end of the car on the south side. He was within about two feet of me—maybe two and a half feet. I should judge we had worked there about five minutes from the time I left him, that is, in that same position. Before that five minutes we had been working in between the tracks at the end of the car and kept working back. We worked side by side within two or three feet apart. We were tightening up the nuts on the bolts. For the last twenty minutes before I left him he was not at any great distance from me. The farthest I was away from him during that time was when I got out from the bottom and walked around the trucks to get at the back end of the car. That was about twenty or thirty or forty-five seconds before I left him. I had worked under the end of the car about five minutes. None of the switchmen or of the switching crew came around the cars during the time that we were working there. I had been working at the American Car & Foundry Company four or five weeks I judge. When we were working under cars and they were about to move them the custom was for the switchman to come back and holler to get out from underneath the car. That custom had prevailed there while I was there. At the time we were working under there and while we were around there and while I was around there with Kettelhake on the 23rd of January no one came back there and hollered for us to get out from underneath the cars. Nobody came back and told us in any way or in any language to get out from under the cars. Nobody came back and told us or in any
80 way notified us that a locomotive or cars were going to come back there towards the car we were under. I did not see anybody anywhere near those cars on that track except the four of us that were working under the cars at any time before I got up and left Frank Kettelhake. My hearing was in good condition. I could hear as well as an ordinary person. When I got up from the end of the car I left Kettelhake working under the end of the car on the north side on the northwest corner of the car. He was under the car at the time. I don't know exactly how many nuts he had to fasten, but I should judge about three or four more. I had to go to the toilet. I started for the toilet. There were then three cars on that track. I should judge the car nearest to the fence was about one hundred or one hundred and ten feet from the fence. The three cars were coupled together on the same track. I don't know the number of that track. That was in the defendants' yards.

As I walked away I walked on the north side of the three cars. I moved at a pretty good gait. I was kind of taken short that day. There was nobody anywhere near on the north side of the cars at that time. I kept going direct east from there. The mill is built there and you go around there and walk north to the toilet. The building marked "X" on Exhibit A is the mill. I should judge it was over a hundred feet from the mill marked "X" down to the car that was closest to the mill. The track from the cars up to the mill was in kind of a curve. It curved from the mill kind of southwest. The belly of the curve ran at the mill—a little north and then kind of south. When I left those cars and went towards the mill I seen a switchman or brakeman, I don't know what they call him, coming towards me, but he was on the southeast
81 side within one hundred feet of me then. When I first saw the switchman he was at the point marked with the letter "Z" on Exhibit D. It was maybe fifteen or twenty feet from where the switch is, kind of west. When I first saw him he was just about here and stopped to turn back again to the switch. He just waved his hand. The cars were coming down, that is all I seen. After that the cars were backing down. He waved his hand giving the signal. When I got around the end of those cars I looked back towards the cars when I seen him give the signal to back up. I could see on the south side. There is a curve there. There was nobody back there in that curve or anywhere around the tracks. When that man signaled with his hand the train backed up towards them cars we were working on. They came down about as fast as a man could walk if he walked a good gait. After this man signaled the cars they got between him and me. All I heard was the bump of the cars and that is all I heard and I kept on going. From the time I first saw him signal the cars to come towards him until I heard the bump of the cars I walked a pretty good gait. I walked pretty fast. I don't know how fast I was walking. From the time I saw him give these people on the engine the first signal until the cars bumped I walked just to about the end of that mill there. When I saw him at the point "Z" on Exhibit D, I was standing right near these here cars, these three cars we were working on. The end of the car nearest to the man giving the signal when he was at "Z" on Exhibit D was at the point marked with the letter "T" on Exhibit D. I should judge that was about one hundred feet, about ninety to one hundred feet.

When the man gave that signal at the point marked "Z" I
82 was at the point marked "S" on Exhibit D. When I was at the point marked "S" there was nobody there only the switchman or the brakeman. I saw him give the signal. He waved and how I seen him wave was I looked back and I could see all the way on the south side of the car, that there was nobody on the south side and I came down on the north. And there was nobody on the north. (Witness points to photograph Exhibit A.) When the cars bumped I had moved to the point marked "R" on Exhibit A. From the point marked "S" on Exhibit D to the point marked "R" on Exhibit A, I judge to be about one hundred

and thirty to one hundred and forty feet. Walking that distance I kept about the same gait all the way through. I walked pretty fast. After I left the point marked "R" on Exhibit A I went around to the toilet. It was a pretty cool day that day and I didn't sit down at the toilet only about three minutes or so. The toilet was kind of open. When I got through there I came straight back, but I took a different course from the way I went. I came through the mill. I think it was a little shorter distance coming through the mill. I came back on an ordinary walk. As I came back I met a young man at the point marked with the letter "U" on Exhibit A. The young man was on a kind of a run. He told me to get hold of the ladder. We took it up to where the man was laying. He was laying between the second and the last car on the north side. That would be the middle car. He was at the one second to the fence. He was pretty near the center of the car. I should judge he was about a foot or about a foot and a half from the car. He was laying there moaning. He held his leg
83 and he was saying "oh, my". I just seen where his pants were torn and bloody. That is all I seen. They were torn at the knee. They were torn a couple of places there. I never took notice of both legs. I should judge it was only about eight or ten minutes from the time I left Kettelhake at work until I got back and saw him lying at the side of the cars. I helped put him onto the ladder and a couple of gentlemen there put a board on the ladder and we carried him up to the office. I helped to carry him to the door of the office and then I walked away. I never took notice of the engine as the cars backed. I just saw the tail end of the cars, as they were coming there. I should judge it is about two hundred feet from the point marked "X" on plaintiff's Exhibit A down to the west fence shown in that picture. I judge it is a little over two hundred feet, I don't know exactly. I saw the switchman at "Z" on Plaintiff's Exhibit D, that was the first time I seen him and he went back to where this "Y" is and then he gave the signal. He went back to the point marked "Y" on Exhibit D, and gave the signal there. I am not versed on railroad signals and switchman's signals. He just gave the signal with his hand. I don't know whether that signal meant to come ahead or go back or stand still, I only seen the cars coming in. They were standing still when he gave the signal. After he gave the signal they came on towards me and him. Then I continued my hurried flight to the toilet, and it was a very short while after that until the cars were so placed that they were between me and this switchman. After that I don't know what the switchman did. I didn't look back at all. My mind was fixed on where I was going to and what I was going to do
84 and I was pressing towards the mark. I had worked about those three cars for about an hour and ten minutes immediately before going to the toilet. I was working first on one car and then another. The west end of the car nearest to the fence was about one hundred and twenty feet from the fence. The cars were about forty feet long, and they were standing right together. The east end of that string of cars would be about two hundred and

forty feet from the west fence. From the east end of that string of three cars to the point marked with the letter "S" on Exhibit D, would be, I judge, about one hundred and twenty feet. And it was about one hundred and ten or one hundred and twenty feet from the point marked "S" on Exhibit D up to this mill. From the time I saw the switchman give the signal and saw the cars obeying that signal by coming towards him, I never looked back after the cars passed between me and the switchman. I met the cars just about where the switchman was when he gave the signal. That was just about the northwest corner of this mill. It is just about at the point opposite the point marked with the letter "V." I only heard the cars bump. I did not see them come together, because the track had a curve in it. My mind was fixed entirely on my trip to the toilet room. I only heard the bump. I seen them backing up on that track but I didn't see them come together. I could not tell you how many cars were in that string of cars that passed me. I know that when an average train of cars stops the cars experience what is commonly designated "running out slack," that causes a bumping sound, but the way that that was of course, it was a loud bump. That was an awful loud bump that I heard. I don't know what became of the switchman whom I had seen at point "Y" in the meantime. I did not know the name of the switchman that I saw there.

85 ALEX SLATER, being duly sworn, testified as follows:

Direct examination by Mr. SAFFORD:

My name is Alex Slater, I am fifty years old, a switchman by occupation, and live at 130 Lewis Avenue in St. Louis County. On the 23rd day of January, 1908, I was switching for the American Car & Foundry Company. Quincy Martin was in the employ of the same company and had charge of the engine crew that I was working on. Walter Tice was firing the engine. I remember coming up through the gate or partly through the gate, where T. P. Randolph was that afternoon, with a string of seven cars. I was on the fourth car from the engine, and it backed down into the yards after it passed Randolph. Quincy Martin was on the train when it started to back down there. He had gone over towards the cars where we wre to couple on. When the car I was on was in the gate which Mr. Randolph was watching, the rear end of the rear car was about at No. 4 crane, it is at the left edge of the picture Exhibit C. When the engine was in the gate where Randolph was watching the rear end of the train would be about at the point marked "N" on Exhibit C. Kettelhake was back on track No. 12. I was not there when he was hurt. I know where the three cars were, they were on No. 12. We pushed a number of other cars on that track, No. 12, that afternoon. It is the track shown on Exhibit A that has the letters "A" and "S" by the rails. (Counsel for defendants admits that is track 12.) I was at No. 4 crane when I got a signal from the switchman on that train to back up. That would be about a carlength from crane No. 5. The letter "N" is marked on the

northeast post of Crane No. 5 on picture D. The middle
86 of the car I was standing on was about two car-lengths from the point "M" on picture C when I got the signal from the foreman of my crew for the train to back down on the track. Martin was the foreman of my crew. When Martin gave that signal he was about a car-len-th or a car-len-th and half from the cars on track No. 12. The signal I got from Martin was a back up signal. I gave the signal to the engineer and he moved back about two miles an hour or two and one-half miles an hour. A man could walk that fast easy enough. I stood on that car until the cars moved back and hit the cars on the track and we were coupled up to the three cars on track No. 12. The train did not stop at any time from the time I gave that signal to the engineer to back up until the cars struck the cars that were on track No. 12. We waited for the signal to back up so everything would be all right. Martin when he gave the signal to back up was at the point marked "A" on Exhibit D. That is about where he stood as well as I can remember. It looked like he was between the building and the mill. From the time Martin gave that signal until the cars ran into the three cars on track No. 12 Martin did not go anywhere to inspect cars that we bumped against. He had no chance to go anywhere. He had not the time. From the time we backed up and made the coupling he had no chance. From the time he gave the signal until the cars I was on struck the three cars he didn't have time to go to the rear of the three cars. He did not go to the rear of the three cars. During that time I do not think he went any where west of the east end of those three cars. The line drawn on Exhibit D, from the letter "A" to the letter "E," shows where Martin traveled during the time from the time when he gave the signal until the cars bumped.
87 Martin made no outcry. My hearing was fair at that time. The cars were not making any more noise than usual at that time. They were moving along slowly.

Cross-examination by Mr. GENTRY:

I could not see Quincy Martin go back the full length of track No. 12 down to the three cars and go along the full length on the side of the three cars because I was not there when he got off of the string of cars he had hold of. He got off and he crossed to see that everything was all right and we went up the hill. I saw him headed in that direction. It was about five minutes after that before he gave me the signal to back up. During that five minutes I did not notice what he did. On the 8th of February, I was interviewed and made a statement in writing as to how the accident happened. My statement was written out and it was read over to me and signed by me. The matter was fresher in my recollection then than it is now. The paper identified as Defendants' Exhibit 1 contains the statement and that is my signature. In giving that statement of the facts I endeavored to give just as truthful an account as to how the accident occurred as I could. I did not make the statement that I saw Martin go back the full length of the car. I saw him go over towards the car. I could not say that he went the full length of the cars or that

he did not. It was his custom to go over to the cars and holler for the men that are under there to get out. I saw him go towards them. I didn't say I saw him go the full length of the cars. I believe I read the statement over myself. I am not sure. I did not know Kellethake was hurt at the time. It must have been at
88 least an hour or an hour and a half after we placed those cars down there before I knew Kettlehake was hurt. I saw him when they sent down after us to go to the office. They were just putting him in the ambulance as we went up to the office. That was pretty nearly an hour and a half afterwards.

Redirect examination by Mr. SAFFORD:

I don't believe any cars were moved in on that track during the entire afternoon of January 23rd, 1908, except the train of cars on which I rode in on track No. 12. Track No. 12 was used for unloading lumber. They were closing down at that time and they had just shoved those cars in to get them out of the way and these men were back there working the bottoms. I was only an extra man at the time. I was first with one crew and then with another. I had been with that particular crew two or three days. During that time the custom was that they always hollered for the men to get from under the cars. Whoever was the rear man said that. Martin was the one that was working the rear end at that time. It was Martin's duty to give the warning.

Recross-examination by Mr. GENTRY:

I can't say whether Martin did or did not notify them. I wasn't close enough to hear.

MRS. AGNES KETTELHAKE, being duly sworn, testified as follows:

Direct examination by Mr. SAFFORD:

My name is Mrs. Agnes Kettelhake. I am thirty-eight years of age and reside at 3363 South Second Street. I was married to Frank Kettelhake in 1888, in Porter, St. Charles County,
89 Missouri. I lived with him nineteen years and up to the date of his death. He was my husband when he died. He worked for me all our life and supported me. We were living at 3363 South Second Street when he died.

The COURT: Did you have any other means of support excepting him?

Mr. GENTRY: I object to Your Honor's question as immaterial.

The COURT: Objection overruled.

To which ruling of the court the defendant at the time duly excepted and still continues to except.

The WITNESS: No, sir.

The COURT: He was supporting you and his family?

A. Yes, sir.

Examination resumed by plaintiff's counsel.

He worked for me and gave me all his earnings. During the last year of his life he earned about forty-five dollars a month. He was fifty years old at the time he died. Mary Elizabeth Kettelhake is my daughter. She was born in 1892. She is seventeen the 20th of August. Theresa Kettelhake is my daughter. Theresa was fifteen the 30th of August of this year. Joseph Kettelhake is my son. He is twelve years old on the last day of November, 1908. Anton Kettelhake is my son—my baby. He was born on the 9th of April, 1907. Frank Kettelhake was the father of all my children. Frank Kettelhake was healthy and well. He had nothing the matter with him at all. During the principal part of his life he was farming. He quit farming in 1902, I think. We came to St. Louis and he worked here for the American Car & Foundry Company for nearly three years. He worked nearly all the time. The average
90 wages he earned during the entire three years was about forty-five dollars per month. He died on the 24th of January, 1908. My husband was a native born American and understood and spoke English. He lived in Missouri all the time I spoke of. His hearing was good and his eyesight was good.

ALEX SLATER, having been previously sworn, being recalled testified further as follows:

Direct examination, by Mr. SAFFORD:

I didn't know what people were working on the various cars stationed around the plant there at that time. In case the shipping track was full we would put them back there on these tracks wherever we could. I don't know whether they would work on them or not. I know we used to put them on there. I did not know that track 12 was used for the purpose of making repairs on old cars or finishing new cars. It was for unloading lumber. I won't say positive whether I knew of any nutting having been done on track No. 12 prior to the time of this accident, but I believe I have. We took them out of there and we put them in there to store them sometimes. I suppose men were doing just what these men were doing on those cars, that is nutting up. I couldn't swear that they were working on them cars or what they were doing there. I have seen men in there, but don't know whether they were working on them or not. I have seen them walking around there. They might have been doing putting on those nuts on the bottom.

FRANK LECHNER, having been heretofore duly sworn, being recalled, testified further as follows:

91 Direct examination, by Mr. SAFFORD:

Mr. Kettelhake and I were working on the three cars together just before he was injured. Mr. Eilers was our foreman and he sent us to go to work there. He sent both of us. We had been working under Mr. Eilers about four weeks. I don't know what Ket-

telhake was doing there all that time. He was only my partner two or three weeks. We worked on a lot of tracks in there. I couldn't remember all of the tracks. We would generally meet Mr. Eilers in the morning and he would tell us where to go. On that particular day he told us where to go. Every time we would get through with a string of cars on one track he would tell us. He told us to go and work on the cars we were working on on that track just before Kettelhake was hurt. Other cars beside those had been put on that track and the same kind of work had been done on them there. They worked on all the tracks during the time I was working there. I could not say how frequently they worked on those tracks. I had worked on that track three or four times. During the four or five weeks that I had worked there, I worked there nutting up cars on that track about three or four times. I have seen other men nutting up cars on that track during that four or five weeks. I couldn't tell exactly how many times but we used to work on them pretty steadily putting the stencil on them and other things. The only other men I saw working on cars there was the two men that were working with us that day. Kettelhake and I must have been there two or three times together. He had been doing the same work as I had been doing putting on those nuts on the bottom.

92 J. M. SCOTT, having been heretofore duly sworn, was recalled to the stand, and testified as follows:

Direct examination by Mr. SAFFORD:

The foreman of the switching crew is supposed to see that everybody is out from under the cars. He is supposed to holler. They do that all the time. It was customary to go along and call out to people that were under the cars before moving any other cars against those cars. That custom had prevailed ever since I have been working down there. I don't know about that track. That is not a very old track. That is just an unloading track. Just once in a great while we put cars in there. They have done some repair work and done nutting upon that track before when they put any cars in there. Lots of times we store cars in there. We put them out on other tracks and just put them there for storage. Sometimes they did some work on that track. Whatever kind of work was needed they did—a brake or pin lever or work on the bottoms. When I say work on the bottoms I mean nutting up. I don't know how frequently any work had been done on track twelve prior to the time Kettelhake was injured. I know that it was done from time to time. I know cars stood there but I don't know that men worked on the bottoms of those cars. We have a special shipping track about a mile long and there is where we fixed up our cars and if we hadn't any cars there to work on go somewhere else. The switching crews were all under my charge. I gave them their instructions.

Thereupon plaintiff asked leave to file an amended petition. Defendant objected to its being filed at this late date.

Thereupon after duly admonishing the jury the court
93 adjourned until October 13th, 1908, at which time the court reconvened pursuant to adjournment and the following proceedings were had, to-wit:

The plaintiff presented an amended petition and asked leave to file same.

Mr. GENTRY: If Your Honor please, the defendant objects to the filing of this amended petition at this time; first, because it is too late to file an amended petition, and, second, because the amendments in both counts constitutes a departure. There is a great deal of new matter injected into this amended petition. There are a great many changes that I do not think of importance, but here is a whole lot of changes on the bottom of page 2 of the first count: "And plaintiff further states that it was the duty of the defendants by the servants and agents of the defendants then and there running, conducting, managing, controlling and operating said locomotive and cars, to exercise ordinary care to not cause or permit said steam locomotive and cars, and especially the car which the said Frank Kettelhake was dangerously near and working about, under and upon, as aforesaid, to move without first exercising ordinary care to discover and notify the said Frank Kettelhake in time for the said Frank Kettelhake to reach a place of safety and avoid injury; that said cars were about to be moved and plaintiff further states that the defendants and the servants and agents of defendants then and there running, conducting, managing, controlling and operating said steam locomotive and cars by the exercise of ordinary care might have known in time to avert the injuries herein described by the exercise of ordinary care that said Frank Kettelhake was tightening nuts of
and working under, about and upon and was dangerously
94 near one of said cars and in danger of being injured and killed by moving said cars if said car was moved without notice to the said Frank Kettelhake, and plaintiff further states that the defendants by their servants and agents, then and there running, conducting, managing, controlling and operating said locomotive and freight cars failed and neglected to exercise ordinary care to discover the said Frank Kettelhake and to notify him that said cars were about to be and would be moved." I say that that injects into the petition a new cause of action in this respect: first, it charges here an act of negligence after there was positive knowledge on the part of the defendant, the American Car & Foundry Co., and on the part of the servants of the American Car & Foundry Co., who were joined as co-defendants, and the other members of the switching crew, that Frank Kettelhake was actually in a position of danger, and after they knew he was there they then violated the humanitarian rule and proceeded on and injured him. The first petition charges that they failed to exercise ordinary care to look out for people, and here they state they had looked out for him and recklessly ran him down. The same thing is found in both counts of this petition, and then the petition joins more than one cause of action, I take it, in each count. It not only charges actual knowledge that

he was there and they knew he was there, but it also charges that they failed to exercise ordinary care to find out if he was there. We have two theories; that they knew he was there and recklessly ran him down and the other charge is that they negligently failed to discover that he was there. Then there are a whole lot of changes here changing from the word "repairing" to "tightening nuts of
95 and working under, about and upon" and so on, which I don't think are material. But I do think the petition is so very much more elaborate than the other petition that we ought to have a continuance in this case if he is permitted to file this petition. It is a departure from the original petition.

Mr. SAFFORD: We don't allege something inconsistent, unless we allege something that necessarily disputes something else.

The COURT: The only serious question in the case is whether by introducing this new cause of action, whether the defendants are not entitled to a continuance. You are entitled to file your petition. The only serious question with me is the exercise of the court's discretion, where you allege now differently from what you alleged in your original petition, if you insist on that phase of the case going in.

Mr. SAFFORD: In the first place all of the evidence is in without objection, and after the evidence is in without objection we have a right to file any amended petition that does not change the cause of action that will fit the evidence in question.

The COURT: You allege that they not only failed to exercise ordinary care to discover his presence, but they knew he was there and failed to notify him.

Mr. SAFFORD: As far as that is concerned I am perfectly willing to scratch out the word "knew." I thought I had done so and with your permission I will scratch that out now.

The COURT: Well, suppose you do that. It has not been filed yet. You can make any changes you see fit.

Mr. SAFFORD: May it please Your Honor I have stricken out "and knew" in this petition.

Mr. GENTRY: I wish Your Honor would compare the two petitions. Here is the original petition (handing the Court a paper).

96 The COURT: Well, the amended petition may be filed. Leave is granted to file an amended petition. Amended petition filed.

Mr. GENTRY: Note the defendant's exception thereto.

Mr. GENTRY: Now, if Your Honor please, the amended petition has been filed and there is a whole new petition here and two counts and I think I am entitled under the statute to three days to plead and I will ask three days.

The COURT: The petition is simply amended to conform to the plaintiff's testimony, and you can re-file the answer you filed to the original petition.

Mr. GENTRY: Your Honor overrules my motion for three days?

The COURT: Yes, that is practically asking for a continuance of the case.

To which ruling of the Court defendant at the time duly excepted, and still continues to except.

Mr. GENTRY: Of course, my next move is to ask for a continuance of the case because of the filing of this amended petition. Defendant has been surprised.

The COURT: That application will be overruled.

To which ruling of the Court defendant at the time duly excepted, and still continues to except.

Mr. GENTRY: Defendants file a motion to strike out the entire amended petition because the allegations thereof constitute a departure from the cause of action stated in the original petition.

The COURT: I will overrule that.

To which ruling of the Court defendants at the time duly excepted, and still continue to except.

Mr. GENTRY: Then there is a motion to require the plain-
97 tiff to elect in each count upon which cause of action stated in each count she will proceed to trial—the motion charging that in each count there are two causes of action; that I have practically already argued with the Court.

Mr. SAFFORD: In regard to the first count plaintiff elects to stand on Section 2864 of the Revised Statutes of 1899, as amended by an act entitled "Damages and contributions in actions of tort," page 135 and page 136 of the Laws of Missouri, 1905; and in the second count of my petition I elect to stand upon that cause of action in said count which is covered by section 2865 of the Revised Statutes of Missouri, 1899, and section 2866 Revised Statutes of Missouri, 1899, as amended by an act entitled "Damages and contributions in actions of tort," pages 252 and 253 of the laws of 1907."

Thereupon, by leave of Court and consent of counsel, the answers of defendants were withdrawn and refiled as answers to the amended petition just filed.

Mr. SAFFORD: All of the replies may be considered withdrawn by consent and refiled as having been refiled at this time.

By the COURT: Leave is granted.

Mr. SAFFORD: Plaintiff now offers to prove by J. M. Scott, C. F. William Bade and Mr. Evans, that the defendant, American Car and Foundry Co., owns property at the fair and reasonable value of three million dollars; and offers to prove by Agnes Kettelhake that when Frank Kettelhake, the husband of the said Agnes Kettelhake, was injured and when he died, the said Agnes Kettelhake had no property of any kind, nature or description whatsoever; nor any means for earning a livelihood; that is to say, offers to prove the financial
98 condition of the plaintiff and of the defendant at the time the said Frank Kettelhake was injured and at the time he died.

Mr. GENTRY: Defendants object to that as immaterial and incompetent and not tending to prove negligence.

The COURT: Objection sustained.

To which ruling of the Court plaintiff at the time duly excepted, and still continues to except.

Mr. SAFFORD: That is all then.

Mr. GENTRY: Now, I offer these demurrers to the evidence, Your Honor.

Thereupon each defendant requested the Court to give to the jury a peremptory instruction in the nature of a demurrer to the evidence.

Said demurrers so offered are in the words and figures following:

(Offered by defendant W. W. Eilers.)

"KETTELHAKE
v.
AMERICAN CAR AND FOUNDRY CO.

At the close of all the evidence offered by the plaintiff in this case the Court instructs the jury that under the pleadings and the evidence in this case the plaintiff is not entitled to recover against defendant William W. Eilers and your verdict must be for the defendant, William W. Eilers."

(Offered by defendant Quincy Martin.)

"KETTELHAKE
v.
AMERICAN CAR & FOUNDRY CO.

At the close of all the evidence offered by the plaintiff in this case the Court instructs the jury that under the pleadings and the
99 evidence in this case the plaintiff is not entitled to recover against defendant Quincy Martin, and your verdict must be for the defendant, Quincy Martin."

(Offered by defendant American Car & Foundry Co.)

"KETTELHAKE
v.
AMERICAN CAR & FOUNDRY CO.

At the close of all the evidence offered by the plaintiff in this case the Court instructs the jury that under the pleadings and the evidence in this case the plaintiff is not entitled to recover against the defendant, American Car & Foundry Co., and your verdict must be for the defendant, American Car & Foundry Co."

The COURT: I sustain the demurrer as to Quincy Martin and W. W. Eilers.

To which action of the Court in sustaining said demurrers plaintiff, by her counsel, then and there saved her exceptions and still continues to except.

Mr. SAFFORD: I take a non-suit as to each count with leave to move to set the same aside and reinstate the cause upon the docket as to Quincy Martin and W. W. Eilers, as to each count in plaintiff's petition.

And thereupon the Court overruled the demurrer to the evidence offered by defendant American Car & Foundry Company; to which action of the Court in overruling the demurrer of the American Car

& Foundry Co., defendant American Car & Foundry Co., at the time, duly excepted and still continues to except.

Mr. GENTRY: Now, there is an action by a resident of the State of Missouri against a defendant corporation organized under the laws of the State of New Jersey. Heretofore, we could not move for a transfer to the Federal Court, but now I ask Your Honor to allow me a half an hour or so to draw up a motion asking leave
100 to remove to the Federal Court. I will give Your Honor authorities showing that that can be done at any time, even after a case has gone to the Appellate Court and has been returned. Whenever the situation arises that you have a plaintiff, a resident of the State of Missouri, and the remaining defendant a resident of another State that motion will lie. I ask leave to put my motion in writing. It is decided absolutely. I can show you in a very little while.

The COURT: Well, get your authorities

(Counsel left court room and returned shortly, when the following proceedings were had:)

Leave granted plaintiff to move, orally, to set aside non-suit as to each count as to defendants Martin and Eilers, before filing by defendant American Car & Foundry Co. of its application for removal and removal bond and which motion was thereupon made orally as follows:

Mr. SAFFORD: By leave of Court before the clerk enters of record the non-suits taken as to Martin and Eilers I move the Court to declare that the oral motion of Mr. Gentry for removal did not state facts sufficient to constitute a cause for removal, and in addition to that move Your Honor to set aside the involuntary non-suit as to each count as to Quincy Martin and William Eilers and as grounds for that motion state that the Court erred in making the ruling as to Quincy Martin and William Eilers.

The COURT: I overrule that motion. In my opinion it does not make any difference. It is the Court's ruling that under the evidence in this case Martin is not liable and in pursuance to that ruling you take a non-suit with leave to move to set the same aside; so that in my opinion he is still a party to the suit. Your mo-
101 tion to set aside the non-suit might hereafter be granted and then we would have a section of the suit in the United States Court and a section here.

To which ruling of the Court in overruling his said motion to set aside the non-suits as to Quincy Martin and Wm. W. Eilers, upon each count plaintiff at the time objected and duly excepted, and still continues to except.

Defendant American Car & Foundry Co., thereupon filed its removal bond and application for removal to this *court* to the United States Court.

Mr. GENTRY: I now present a petition for removal, and also offer with it a bond in the sum of one thousand dollars, the form provided by statute with Edwin W. Lee and myself as sureties. Mr. Safford has agreed so far as the surety is concerned there will be no objection.

Mr. SAFFORD: I have no objection to the bond so far as the sufficiency of the sureties are concerned.

Mr. GENTRY: Now, I offer these.

Said petition for removal and removal bond are in the words and figures following:

"STATE OF MISSOURI,
City of St. Louis, ss:

In the Circuit Court of the City of St. Louis.

AGNES KETTELHAKE, Plaintiff,
v.
AMERICAN CAR & FOUNDRY COMPANY, Defendant.

Now, this day comes the American Car & Foundry Company, the above named defendant, and files its motion for the removal
102 of the above entitled cause to the United States Circuit Court for the Eastern Division of the Eastern District of Missouri, and respectfully shows to the Court that the above suit is a civil action for the recovery, by plaintiff, of damages for personal injuries alleged to have been received by plaintiff while in the employ of said defendant, and that the said cause is now wholly between citizens of different states. The plaintiff in said cause was, at the time of the commencement of said suit, and still is, a citizen and resident of the State of Missouri, and a non-resident of the State of New Jersey, and that the said defendant, American Car and Foundry Company, was, at the time of the commencement of said suit, and still is, a citizen of the State of New Jersey, a resident of said State of New Jersey and was, at the date of the commencement of said suit, and still is, a non-resident of the State of Missouri; and that the matter and amount in dispute in said cause, exclusive of interest and costs, exceeds the sum or value of two thousand dollars ($2,000.00).

And your petitioner further states that heretofore, from the time of the institution of this suit until the present moment, one William W. Eilers and Quincy Martin, both of whom were and are, residents of the State of Missouri, were joined with this defendant as co-defendants in this suit, and that now since the plaintiff has taken a non-suit as to the said two defendants, who are residents of the State of Missouri, the controversy in this case is for the first time between citizens of different states, to-wit: the plaintiff Agnes Kettelhake, and the defendant, American Car & Foundry Company, and that until the present moment your petitioner, American Car & Foundry Company, has not had an opportunity to present to this court its
103 petition for the removal of this cause to the United States Circuit Court for the Eastern Division of the Eastern District of Missouri, on the ground of diversity of citizenship, on account of the fact that the said William W. Eilers and Quincy Martin were joined with this defendant as co-defendants in this cause.

And your petitioner offers herewith bond, with good and sufficient surety, for its entering in the Circuit Court of the United States for

the Eastern Division of the Eastern District of Missouri, on the first day of its next session, namely, its March term, 1909, a copy of the record in said suit, and for paying all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said cause was wrongfully or improperly removed thereto.

Wherefore your petitioner prays this honorable Court to proceed no further herein, except to make the order of removal as required by law and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States, and, as in duty bound, your petitioner will ever pray.

(Signed) AMERICAN CAR & FOUNDRY CO.,
E. F. CARRY, *1st Vice-President,*
Petitioner."

WATTS, WILLIAMS & DINES,
Attorneys for Petitioner."

"In the Circuit Court, City of St. Louis.

AGNES KETTELHAKE, Plaintiff,
v.
AMERICAN CAR & FOUNDRY COMPANY, Defendant.

Removal Bond.

Know all men by these presents that the undersigned, American car and Foundry Company, as principal, and W. R.
104 Gentry and Edwin W. Lee, as surety, are held and firmly bound unto Agnes Kettelhake in the sum of one thousand dollars ($1,000) for the payment of which, well and truly to be made, we do jointly and severally bind ourselves, our heirs, successors, legal representatives and assigns, firmly by these presents.

The condition of the above bond is as follows:

That, whereas the above bounden American Car & Foundry Company has filed its petition in the Circuit Court of the City of St. Louis, State of Missouri, for the removal to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, of a certain cause now pending in said State Court wherein the said Agnes Kettelhake is plaintiff and the said American Car and Foundry Company is defendant;

Now, therefore, if the said American Car and Foundry Company shall enter in the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 13th day of October, 1908.

(Signed) AMERICAN CAR & FOUNDRY CO.,
[SEAL.] By E. F. CARRY, *1st Vice-President.*

Attest:

J. F. ROBISON,
Ass't Secretary.

(Signed) WM. R. GENTRY.
(Signed) EDWIN W. LEE."

105 Approved in open Court this 13th day of October, 1908.

(Signed) FRED H. KREISMANN, *Clerk.*"

Mr. SAFFORD: I file and offer for the consideration of the Court a demurrer to the petition for removal.

Demurrer filed:

(Said demurrer to the petition for removal is in the words and figures following:)

"STATE OF MISSOURI,
City of St. Louis, ss:

In the Circuit Court of the City of St. Louis, October, A. D., 1908, Term.

AGNES KETTELHAKE, Plaintiff,
v.
AMERICAN CAR & FOUNDRY COMPANY et al., Defendants.

Comes now the above-named plaintiff and demurs to the petition for removal of defendant, American Car & Foundry Company, and for grounds of such demurrer states that said petition for removal of this cause to the Federal Court does not state facts sufficient to constitute a cause of removal of this cause to the Federal Court.

(Signed) AGNES KETTELHAKE,
By GEO. SAFFORD, *Her Att'y.*"

The COURT: The demurrer will be overruled.

To which ruling of the Court plaintiff at the time duly excepted, and still continues to except.

Mr. SAFFORD: I would like now to file a denial of the facts.

106 The COURT: You can file your denial, but I will not hear any evidence on it.

Denial filed:

(Said denial of facts is in the words and figures following:)

"STATE OF MISSOURI,
City of St. Louis, ss:

In the Circuit Court of the City of St. Louis, Missouri, October, A. D., 1908, Term, Room 5.

AGNES KETTELHAKE, Plaintiff,
v.
AMERICAN CAR & FOUNDRY COMPANY et al., Defendants.

Comes now Agnes Kettlehake and for answer to the petition of removal of the American Car and Foundry Company herein filed, *and* states that said cause is not now wholly between citizens of different states.

(Signed) GEO. SAFFORD,
Attorney for Plaintiff."

By Mr. SAFFORD: I will ask leave to offer evidence on it.

The COURT: Well, I don't think evidence should be heard.

To which ruling of the Court plaintiff at the time duly objected and excepted, and still continues to except.

Mr. SAFFORD: Now, will Your Honor rule formally on the application?

The COURT: Your denial is somewhat a novel thing it seems to me. Here is the record that speaks for itself, but you may file a denial and the application for removal will be denied.

107 To which action of the Court in denying the application for removal, defendant American Car & Foundry Co., at the time duly excepted, and still continues to except.

Thereupon the defendants to support the issues in their behalf introduced the following evidence:

QUINCY MARTIN, of lawful age, being first duly sworn to tell the whole truth, testified as follows:

Direct examination by Mr. GENTRY:

I live at 1302 Hickory street. I am employed now by the Wabash Railroad Company. I am not connected in any manner with the American Car & Foundry Company. I left the employ of the American Car & Foundry Company about two months ago. I was employed by the defendant American Car & Foundry Company on the 23rd day of January of this year on the day of Mr. Kettelhake's accident. I was employed there as foreman of the switching crew. I am the same Quincy Martin that these parties have been referring to. I remember of going in with a cut of seven cars onto track twelve that afternoon. I remember that the cars that were standing on that track had been there all that day. I don't remember whether they had been there the day before or not. I had seven cars at that time. They were freight cars, what is commonly called coal cars. I think they were box cars, I would not be sure. Before pushing the seven cars down against the three cars there, we took the same

precaution that we always take, going back to see if anyone was around the cars. I dropped off at the foot of the hill and I asked the gate watchman to close the switch on top of the hill in order to give
108 me a chance to go across this distance and he done so and I walked across and hollered. "Look out!" two or three times. I walked across to track twelve. I walked back to the rear of the cars. I didn't walk around both sides. I went back the full length of the three cars, but I did not go around the cars, but I hollered "Look out!" I used a pretty good tone of voice. I have good lungs. I spoke very loud. I hollered "Look out on track 12!" and I had to walk, say two or three car lengths, in order to give a signal to the engine crew to come around the curve. They had backed around and were stopped waiting for the signal. And when I gave the signal I was facing the engine. I didn't go clear back to the cars again. After you get the people out from under the cars or notify them that you are going to hit them they generally stay out. As the engine came back I walked to where the cars were. I didn't go clear back to the cars. It might have been thirty feet from the cars, about a car length. They have automatic couplers there. In striking the cars didn't bump hard because there is a stub back there and we didn't care to hit them hard, or it would have thrown them off the track. I don't know just what distance the cars stood from the rail. We might have moved them a car length. We could not have moved them farther than that without getting them off the track.

Cross-examination by Mr. SAFFORD:

I don't remember the exact date when I began to work for the American Car & Foundry Company. I worked for them one summer and winter. I was foreman of the switching crew that switched that cut of seven cars in against the cars by which Kettelhake was found. I gave the signal to back up. My father is at 1302
109 Hickory street. His name is George Reese. You understand that I was working there under the name of Martin. My last name is Reese. My full name is Walter Reese. I was working under the name of Quincy Martin at the American Car & Foundry Company. I had to in order to get a job. I was going under a false name. I have been about twenty-one years now switching box cars and one thing and another, and I have been tangled up in strikes in one part of the country and another and I found it very difficult to get jobs. I did not give a false name down there because I was indebted to certain parties in this town and didn't want them to locate where I was. My duties as foreman of that switching crew were to instruct and tell the men that were working for me what to do, and when I gave them a signal to move the cars, it was their duty to do it. I was foreman over the men that was running the locomotive and the seven cars, and it was my duty to signal the engineer and other men working for me where and when and how to place the various cars in the yards. It was my duty to instruct Frank Slater and Walter Cowell when and where to move

these seven cars and locomotive that moved in and moved the cars that Frank Kettelhake was hurt by. I did signal Slater to move those cars in against the cut of three cars there, and Slater in pursuance of that signal signalled the engineer in charge of the train to move those cars in. I don't know whether Kettelhake was working under them or not. It was the three cars that was standing on track twelve when Kettelhake was injured. Cowell moved the engine and cut of seven cars against the three cars on track twelve in pursuance of the signal that I gave to Slater and Slater passed
110 to him. It was my duty to go down by those three cars and notify the persons working on said cars to get away from said cars. We had always done that. We had done that every day a dozen times a day. It was our duty to get everybody out from under the cars. It was our duty not to bring the others down until we had got these people out. We didn't do that. It was my duty to cause the locomotive and seven cars thereto attached to not come down and move the three cars until all the workmen were away from the three cars on track twelve. It isn't necessary for a man to walk clear around the cars. If a man goes up one side of the car he can look under the cars and speak loud enough for the men to hear him the length of this hall. You can walk along one side of the box cars and see whether or not anybody is there. You can also tell whether or not he is on the other side. And you can tell whether or not he is working on the other side, but still a man can be away from a car and come back there. The man on the other side of the car could be behind a truck or something and a man walk along and not stop and see him. I don't know that I stopped at all. I just walked right along. I didn't walk around on the north side of those cars. That track runs in a southwesterly direction. It comes in from the west. De Kalb at that place runs practically parallel with Broadway. Broadway runs nearly north and south, but not exactly so. The track runs in a southwesterly direction. It circles clear around. It was between eight and ten car lengths from the end of the track by the fence on Exhibit A to this little building by the letter "U" on Exhibit A. About nine or ten cars altogether could be placed on that track where Kettelhake was hurt. If nine cars, touching each other, were on track twelve at
111 the time of Kettelhake's injury and one of them was around here as near to the fence as it could be, the other end of that train of cars would be about the letter "R" on Exhibit A. I dropped off of the train at the point marked "H" on Exhibit C and walked across here. I walked clear over to the car. I did not see Frank Lechner. I don't know him. I never saw him until yesterday. I know him now. I did not see him at the time I looked under those cars. I did not see Frank Kettelhake at the time I looked under those cars. I don't know either Hango or George by name. I was not in a hurry to get those cars shoved in there, it was not getting pretty close along to quitting time. We never quit until seven or eight o'clock. We had the same amount of work as we had every day. We had at least one hundred and fifty cars every day and we had to make every move count in order to do it. We had so much

to do every day. We could not crowd the cars any faster than we could work them with the crane, as fast as they would take them. When I started, this cut of seven cars and engine ran up beyond where Randolph was. The engine might have reached or crossed over there. Probably the engine would have been out on the Iron Mountain tracks. Then the rear end of the train would be up on top of the hill. It would be just past the switch. In other words, it just went far enough to pass the switch to back in. They could back in off of the old Iron Mountain tracks and do it safely. It was necessary for them to wait to back in off of the Iron Mountain tracks. I don't know whether Frank Slater was on the middle car at that time or not. He might have been on the ground or on top. The middle car was up near the Dorcas street crossing. It was bound to
112 have been Dorcas street it — just south of the plant. Then there were three cars between that and the locomotive and the locomotive was south of that yet. There were three cars between Dorcas street and this switch. The switch I refer to is up there outside of the gate. I simply asked Randolph to throw the switch for me in order to give me a chance to go over and get the men out from under the cars. Randolph was then at his place of duty and he did this as a favor to me. I don't know what the building on Exhibit B marked with a letter "J" is called, unless it would be the round-house. The building marked with the letter "X" on Exhibit A is the old shop. It was about eight car lengths from the old shop marked "X" up to the gate where Randolph stood when I went up and spoke to him about fixing the switch. I simply asked him to throw the switch for me and as soon as they pulled over the switch he throwed the switch. I was north of him when I did that, probably four or five car lengths. I did not necessarily have to holler loud to him. It was between seven and eight car lengths from the shops up to this gate, somewhere near there. I would not be positive about that. Then I walked down and looked under this car and walked back and signaled to Slater on top of the cars to come back with the cars. I must have been probably four or five car lengths from the rear end of the train when I gave that signal to Slater. I don't know how far I was away from the cut of three cars by which Kettelhake was injured when I gave that signal. It might have been two or three car lengths. Three car lengths would be about one hundred and twenty feet. I guess it was about that. I did not go back the second time after giving that signal to Slater and
113 notify anybody under those cars. And I didn't holler to anybody around there the second time. I hollered two or three times the first time I went back. When I hollered to get out I was back of the cars then—that is the cars that were on the rear end of the track, the three cars at the rear end of that track. I don't know exactly where I was with reference to those three cars when I hollered because usually when we are getting out men from under those cars we go back there and holler "Look out on this track!" and maybe repeat it a dozen times. Sometimes we repeat it more than other times. I might have hollered four or five times. I am not certain. I hollered several times, anyhow. I remember I hol-

lered several times. Of course, I don't know how many times I hollered on the tracks. We always made it a rule, of course, to holler. And because I was in the habit of doing that I think now that I did it on that occasion. That is the reason now I believe I hollered on that occasion. I haven't any recollection as to how many times I hollered. I didn't count the times. From the time that I went across to where the cars were at and came back and give the signal it was, in my opinion, five minutes or a little bit more. I don't know the exact time. It might have been possibly a little longer. When I went down there I went clear to the end of the cars. I was far enough around to look across the tracks to see the back end of the car. I did see it. A car is never shoved up on those tracks until it has paint on it. I don't remember of seeing whether that end of that car was painted at that time or not. That was clear outside of my business. I could not tell you what trucks were under that car. It was not my business as to what kind of trucks they had. I do remember what kind of cars they were. They
114 were M. K. & T. coal cars. I know that they had trucks on them, too. They were building M., K. & T. cars at that time, and I don't remember of them building others at that time. I don't remember positively whether they were M., K. & T. cars or not—I think they were. I don't know if the stencil was put on or not. I don't know much about their color, just an ordinary color of a car. I don't know anything about that. There was some of them painted, I know. I know they were cars and had wheels under them or I could not have shoved them on the rails. I don't know positively who they were for or anything about it otherwise. I don't remember what I saw when I say I was by those three cars on that occasion, whether or not those cars were painted then. But I think they were. I never handled a car that came out of the shop that did not have at least one coat of paint on it.

The COURT (addressing Mr. Safford): You are going into a great deal of unnecessary details, and then cross-examining him as to his answers.

Mr. SAFFORD: I am testing his recollection.

The COURT: You are going too far.

If anyone had been under those three cars I could have seen them if I had gone along there and looked for them. To the best of my recollection it was a cloudy day and very cold and very bad weather. I think it was a dry cold. Any way I know it was a very cold day.

Redirect examination by Mr. GENTRY:

I did not see Mr. Kettelhake or anybody else at or under or near anyone of those three cars when I went down there and called out to "look out." I did not see Frank Lechner. I never saw the
115 man before in my life until I met him yesterday that I know. The first I knew of anybody being hurt was when Mr. Edmunds, a clerk in the office, came along an hour or longer afterwards. He notified me that we hurt a man in the lumber yards. I did not hear any outcry of pain. I did not hear anybody holler. It

was at least an hour afterwards before I learned anything about it. I did not have any information from any source either by seeing or otherwise that Kettelhake was working under that car.

Recross-examination by Mr. SAFFORD:

I knew that men were working under cars on that track from time to time. Wherever you found a new car you would expect to find men working on them. To the best of my knowledge Frank Slater stayed about the same position he was in after they shoved down there around the curve that was on the middle car. We didn't intend to shove those three cars any, but after we coupled to them I don't know how much we moved them, maybe five feet and maybe twenty feet. During all that time Slater was up on top of the car, I don't remember whether it was the middle car or not.

WALTER M. COWELL, being duly sworn, testified as follows:

Direct examination by Mr. GENTRY:

I am in the employ of the American Car & Foundry Co. as a locomotive engineer and was in that same position on Jan. 23rd, and had been for four years prior to that time. I remember when we pushed the cut of cars in on track 12 that afternoon and bumped them against the cars standing near the west fence. As we were pulling up track 8, Martin jumped off and walked
116 towards track 12. Slater gave me a signal to back up in the yards. Martin went towards track 12. He was in my view just merely a couple of car-lengths. Lumber piles obstructed my view. At one point there was an opening. Through that opening I saw Martin at the head of the cut of three cars, the second car from the rear end. He was then coming towards my train again. I could not see him when he gave the signal. I took it from the head man, on the second or third car. I backed up slow, about two miles an hour, hardly that. We backed up easy. The bump sounded like iron knuckles coming together. It was just a little bump. It made no unusual noise. I did not see Kettelhake on that occasion. I did not know anyone was under those cars.

Cross-examination by Mr. SAFFORD:

It was Quincy Martin's duty or any rear man's duty to go back there and learn who was about those cars. And it was his duty to signal my train what to do. His signal was passed to me by Slater, and acted upon. I did not make any investigation as to whether persons were near or under those cars. It is not my business to investigate. I always take notice and if there is anybody around I can see them. I was coming down around the curve and there was a lot of lumber piled up around there. I could not see the bottoms of those cars. I could see about half way down the side of the cars. As to the rest of the space all along the cars my view was obstructed by lumber except in one certain place where we stopped on the hill.

At that one place there was a little hole I could look through. I don't know exactly how wide it was but I judge about twenty feet
117 wide. The cars were about thirty-six feet long. They were box cars. After I got around so I couldn't see through that hole that was the last glimpse I had of those cars. After the cars coupled onto those three cars we pushed back a little bit. It was not our idea to couple them together and pull off of that track. We wanted to push all the cars into the switch. From the place where the three cars first stood until the place we finally left them was about six car-lengths. On Exhibit A the letters "A" and "B" on track twelve are put where each end of those three cars was before we moved them. "A," and "B" and "C" on Exhibit A mark the end of the three cars as they stood on the track before we moved them. Then we moved those cars six car-lengths back. They were then up to the rear end of that track just as far as they would go. There is room for nine cars on track twelve. From the point "D" on the photograph down to the end of the track there is room for six cars. Before we moved those cars they were way up here by "X" and we moved them down there, away down near the fence as far as the track goes. The points "E," "F," "G" and "H" on Exhibit A would represent the ends of the three cars on track twelve before we moved them at all. We had nine cars on track twelve and if they were all touching each other they would run from the letter "H" on Exhibit A clear down to the end of the track by the fence. I didn't hear any outcry when I pushed those cars down there. I was not listening for any outcry. I did not know that I had injured anybody. I first learned it about 5:30. That was about an hour and a half after we had pushed the first cut of cars in there. No other cut of cars had been pushed in there that afternoon. Those three cars had not been moved that afternoon before I moved them.
118 They stood still on the track the entire afternoon except at the time I moved them as I have just testified. And that was only once. I am acquainted with Quincy Martin. I expect I had known him six months at the time of the accident. I moved the cars back there at the rate of about two miles an hour. They were not going as fast as a man would ordinarily walk. It is an every day occurrence to think about the speed. I remember that trip. I always go as carefully as I can where I cannot see. I did not notice so particularly at that one particular place. I had no occasion to notice them at that time. I did not know anybody had been injured. I did not have anything to bring the speed of those cars to my attention until I learned that Frank Kettelhake had been hurt an hour or two afterwards. Then I remembered the speed and everything.

Mr. GENTRY: I now offer in evidence in contradiction of the testimony of the witness, Frank Slater, the statement identified by the stenographer as Defendants' Exhibit 1, signed "Alex Slater," which statement was shown the witness yesterday. I want to read it to the jury.

Mr. Gentry thereupon read the statement dated St. Louis, Missouri, 2-18-'08, and marked by the stenographer as Exhibit 1 for identification, which is in words and figures as follows:

"St. Louis, Mo., 2-18-'08.

My name is Alex Slater, 130 Lewis Avenue, St. Louis County. I was a switchman at the Car Company on engine No. 11, and was there the day Kettelhake was killed. I have read Quincy Martin's statement and can say that it is true and correct. We were backing in with several coal cars. I was on the third car from the engine, taking Martin's signals. Before we coupled onto the three cars where Kettelhake was found I saw Martin go up to the full length of the three cars, look under all the cars to see if there was anyone around or under those three cars. When he got to the end and saw that all was clear he signaled and then we coupled. We did not hardly bump these cars and did not move them over a foot or more at the very least. I was looking up the track and did not see Kettelhake or anyone else outside of Martin on or near these cars or tracks. In fact, I was sure there was no one there. We did not know anyone was hurt for at least an hour and a half after this. Even after warning workmen down here at the works we switchmen have to pull them off of the tracks. They do not appreciate danger it seems. (Signed) Alex. Slater."

Defendant rests.

Mr. Safford: I would like to recall Mr. Cowell a minute.

Mr. Walter M. Cowell, having been heretofore duly sworn was recalled to the stand and testified as follows:

John Tice was firing the engine that day. In the crew was a foreman and a switchman and a fireman and myself. That is all we had had that day. The fireman laid off that day. The first thing we always did was to stop before we hit that cut of cars and then a man would go along and holler under the cars, under each and every car holler "get out." And that stop was ordinarily made just before we coupled together. They didn't necessarily have to be right close together; just so we stopped before we got to that cut of cars, within a couple of cars, sometimes three car-lengths. And it was after the cars got that close that a man went down and notified the people to get out. The cars would then be in sight of the other end of the cut. We went off of track eight off on the hill. We were at that time moving away from the cars in question and not anywhere near and not coming towards them. I don't know whether Quincy Martin went back along those cars or not. I saw him cut across there. After the signal was given he did not go to the rear end of the cars.

Plaintiff rests.

And this was all the evidence offered in the case.

Thereupon the jurors were excused until two o'clock.

Thereupon the defendant American Car & Foundry Company offered the following instruction, — the nature of a demurrer to all the evidence:

"At the close of all the evidence in the case, the Court instructs

the jury that under the pleadings and the evidence the plaintiff is not entitled to recover against the defendant, American Car & Foundry Company, and your verdict must be in favor of said defendant."

Which instruction in the nature of a demurrer to the evidence the Court refused to give; and to the action of the Court in so refusing, the defendant American Car & Foundry Company duly excepted and saved its exceptions at the time.

The COURT (addressing Mr. Safford): I understand you are going to the jury only on the first count?

Mr. SAFFORD: Yes, sir.

The COURT: Confine your instructions to that count.

Thereupon court adjourned until two p. m. of the same day at which time court reconvened pursuant to adjournment and the following proceedings were had, to-wit:

121 Mr. SAFFORD: Paintiff voluntarily dismisses as to the second count of the petition and elects to go to the jury on the first count.

Thereupon the court gave and read to the jury the following instructions upon the part of the plaintiff:

(6) The court instructs the jury that if you find in favor of the plaintiff on the first count of her petition you will award her such damages, not less than two thousand dollars and not more than ten thousand dollars, as you may deem fair and just under the evidence in this case with reference to the necessary injury resulting to her from the death of her husband; and in determining what such necessary injury is, you should consider all the evidence before you, bearing upon that question.

(5) The court instructs the jury that the burden of proving that Frank Kettelhake was guilty of negligence and that negligence of Frank Kettelhake, if any, was the direct and proximate cause of the injury and death of the said Frank Kettelhake, is upon the defendant.

(To which action of the Court in giving said instructions and each of them defendant at the time duly objected and excepted, and still continues to except.)

Thereupon the Court of its own motion instructed the jury as follows:

(1) The Court instructs the jury that if you believe and find from the evidence that the defendant American Car and Foundry Company employed Walter Cowell, Alexander Slater and Quincy Martin to run, conduct and manage a steam locomotive and train of cars, and that Frank Kettelhake was then in the employ of the American Car and Foundry Company, and was acting in the course of his employment and working about and upon a string of

122 three cars on track twelve, and that it was the duty of said Quincy Martin to exercise ordinary care not to cause or permit said locomotive and train of cars thereto attached to move against and move a string of three cars on track number twelve in the plant of the said American Car & Foundry Company until he, Martin, notified all persons working about and upon said string of

three cars of the approach of said train of cars and gave such persons a reasonable time under all the circumstances to reach a place of safety, and if you also find and believe from the evidence that said Quincy Martin omitted to exercise ordinary care not to cause or permit said locomotive and train of cars thereto attached to move against and move said string of three cars on said track twelve, without first giving notice as aforesaid, and by such failure to exercise ordinary care, if there was such failure on the part of the said Quincy Martin, the said Quincy Martin directly and proximately caused the said Frank Kettelhake, on January twenty-third, 1908, to be run upon and over by one of said three cars and injured so severely that by reason thereof he died on January twenty-fourth, 1908, and if you further find from the evidence that said Quincy Martin, by the exercise of ordinary care would have known that Frank Kettelhake was working about and upon said string of three cars and was likely to be injured if the same were moved without notice to the said Frank Kettelhake in time to have averted the injury by exercising ordinary care not to cause or permit said train of cars to run against and move said string of three cars, and that the said Frank Kettelhake, when he was injured and when he died, was the lawful husband of this plaintiff, Agnes Kettelhake, then, unless you find that the said Frank Kettelhake himself was
123 guilty of negligence and that said negligence of the said Frank Kettelhake directly and proximately caused him to be injured, you will find against defendant American Car and Foundry Company and in favor of plaintiff Agnes Kettelhake.

And the court further instructs you that unless you find the defendant or its servants or agents guilty of one of the acts of negligence set forth in this instruction, then your verdict must be in favor of the defendant.

And to the action of the Court in so giving said instruction the defendant American Car and Foundry Company, by its counsel, then and there excepted and saved its exceptions at the time.

Thereupon the Court, at the request of defendant American Car and Foundry Company gave to the jury the following instructions:

(2) The Court instructs the jury that if you believe and find from the evidence in this case that it was the usual custom in the defendant's yards, before placing cars upon any track, against cars which were standing thereon, for a switchman of a switching crew which was about to place such cars, to go forward on the track and to call out a warning which might be heard by persons situated beneath the cars standing on such track, in order to notify them that such cars were likely to be moved; and if you believe and find from the evidence in this case that the defendant Quincy Martin was acting as switching foreman on the occasion in question, referred to in the evidence, and that, in the performance of his duty as such foreman, before causing the cars to which the engine was attached to be pushed into close proximity to the three cars standing on track 12, mentioned in evidence, went along said track 12 to the three
124 cars referred to in the evidence, and went the entire length of said three cars, and looked under and about the same and

called out a warning in the usual and customary manner; and if you further find from the evidence that the warning so given, if it was given, by said Quincy Martin, was such that it would have been heard by Frank Kettelhake, (if he was then at work about or under one of said three cars, if he had exercised ordinary care to observe his surroundings and to listen for warnings) in time to have enabled him to reach a place of safety before the cars attached to the engine bumped against one of the three cars standing on said track 12, then the plaintiff is not entitled to recover in this case against the defendant and your verdict must be in favor of the defendant.

(3) The Court instructs the jury that the defendant American Car and Foundry Company was not an insurer of the safety of its employes, and that the only duty which it owed to Frank Kettelhake, as one of its employes, was to exercise ordinary care for his safety. In this connection, you are further instructed that it was the duty of Frank Kettelhake himself, on the occasion referred to in the evidence, to exercise ordinary care for his own safety, and even if you find from the evidence that the defendant American Car and Foundry Company, or any of its servants, failed to exercise ordinary care in the handling of its train of cars on said occasion, yet, if you further find from the evidence that Frank Kettelhake failed to exercise ordinary care for his own safety and that, as a result thereof, he sustained injuries from which he died, then the plaintiff is not entitled to recover against the defendant.

(4) By the term "ordinary care" as used in these instructions is meant such care as a reasonably prudent person would have
125 exercised under the same, or similar circumstances; failure to use ordinary care, such as a reasonably prudent person would have exercised under the same or similar circumstances, is negligence.

To which action of the Court in giving said instructions and each of them, plaintiff at the time duly objected and excepted, and still continues to except.

Thereupon the Court gave to the jury the following instruction of its own motion:

(7) The Court instructs the jury that nine of your number have the power to find and return a verdict, and if less than the whole of your number, but as many as nine, agree upon a verdict, the same should be returned as the verdict of the jury, in which event all of the jurors who concur in such verdict shall sign the same.

If, however, all of the jurors concur in a verdict, your foreman alone may sign it.

To which action of the Court in giving said instruction defendant at the time duly objected and excepted, and still continues to except.

And thereafter, to-wit, upon the 13th day of October, A. D., 1908, the jury returned a verdict into Court in favor of plaintiff; which said verdict is in the words and figures as follows, to-wit:

"In the Circuit Court, City of St. Louis, Division No. 5.

AGNES KETTELHAKE, Plaintiff,
vs.
AMERICAN CAR & FOUNDRY CO., a Corporation, Defendant.

We, the jury, in the above cause, find in favor of the plain-
126 tiff on the issues herein joined on the first count of the peti-
tion and assess her damages at five thousand four hundred
($5,400.00) dollars.
(Signed) ALEXANDER A. FISCHER, *Foreman.*"

To which verdict, and the form thereof, defendant at the time duly objected and excepted, and still continues to except.

And thereafter, within four days after the said trial of said cause, and at the same, the October, 1908, term of said court, upon the 16th day of October, A. D. 1908, plaintiff filed her motion to set aside nonsuit as to Quincy Martin upon the first count of her petition; and to reinstate cause upon docket as to Quincy Martin upon the first count of plaintiff's petition; which said motion is in the words and figures following:

"STATE OF MISSOURI,
City of St. Louis, ss:

In the Circuit Court in and for the City of St. Louis, Missouri, October, A. D. 1908, Term, Room 5.

No. 51928.

AGNES KETTELHAKE, Plaintiff,
vs.
AMERICAN CAR & FOUNDRY COMPANY, WILLIAM W. EILERS, and QUINCY MARTIN, Defendants.

Comes now Agnes Kettelhake, plaintiff in the above entitled cause, and moves the court to reconsider the ruling made by this Honorable Court in overruling plaintiff's oral motion to set aside plaintiff's in-
voluntary non-suit and reinstate said cause as to Quincy
127 Martin, defendant, in said first count of plaintiff's petition,
and plaintiff further prays the court to set aside the involuntary non-suit taken by plaintiff in said cause with reference to Quincy Martin upon the first count of plaintiff's petition and reinstate said cause upon the docket as to said Quincy Martin upon said first cause of action set out in plaintiff's petition, and for grounds of this motion states:

That the Court erred in sustaining the demurrer to the evidence of plaintiff upon the first count in her petition as to the defendant Quincy Martin, to which ruling of the Court plaintiff objected and then and there saved her exceptions at the time;

That the Court erred in overruling the oral motion of this plain tiff, made immediately after said involuntary non-suit with leave t reinstate was taken, and before defendant's motion for removal wa filed, to set aside said non-suit and reinstate said cause as to defend ant Quincy Martin in the first count of plaintiff's petition, upon th docket, to which ruling of the Court this plaintiff objected and the and there saved her exceptions at the time;

That the Court erred in ruling at the end of plaintiff's cause whe plaintiff's evidence was all in and before the defendants opened thei defense, that the defendant, Quincy Martin, was not liable upon th first count in plaintiff's petition, to which ruling of the court thi plaintiff objected and then and there saved her exceptions at th time;

That the Court erred in instructing the jury at the close of all th evidence offered by plaintiff, that the plaintiff was not entitled to re cover against defendant, Quincy Martin, upon the first count i plaintiff's petition, and in instructing the jury that their ver
128 dict must be for the defendant William W. Eilers upon sai count in said petition, to the giving of which instruction thi plaintiff objected and then and there saved her exceptions at th time.

(Signed) GEORGE SAFFORD,
Attorney for Plaintiff.

Thereafter, within four days after said trial and at the same, th October term of said court, on the 16th day of October, A. D. 1908 plaintiff filed her motion to reinstate cause upon docket as to Wi liam W. Eilers upon the first count of plaintiff's petition; whic said motion is in the words and figures following:

"STATE OF MISSOURI,
City of St. Louis, ss:

In the Circuit Court in and for the City of St. Louis, Missour October, A. D. 1908, Term, Room No. 5.

No. 51928.

AGNES KETTELHAKE, Plaintiff,
v.
AMERICAN CAR & FOUNDRY COMPANY, WILLIAM W. EILERS, and QUINCY MARTIN, Defendants.

Comes now Agnes Kettelhake, plaintiff in the above entitled cause and moves the Court to reconsider the ruling made by this Hon orable Court in overruling plaintiff's oral motion to set aside plain tiff's involuntary non-suit and reinstate said cause as to William W Eilers, defendant, in said first count of plaintiff's petition, and plain tiff further prays the Court to set aside the involuntary non-sui taken by plaintiff in said cause with reference to William W. Eiler

upon the first count of plaintiff's petition and reinstate said
129 cause upon the docket as to said William W. Eilers upon said first cause of action set out in plaintiff's petition, and for grounds of this motion states:

That the Court erred in sustaining the demurrer to the evidence of plaintiff upon the first count in her petition as to the defendant William W. Eilers, to which ruling of the court plaintiff objected and then and there saved her exceptions at the time;

That the Court erred in overruling the oral motion of this plaintiff, made immediately after said involuntary non-suit with leave to reinstate was taken, and before defendant's motion for removal was filed, to set aside said non-suit and reinstate said cause as to defendant William W. Eilers in the first count of plaintiff's petition, upon the docket, to which ruling of the Court this plaintiff objected and then and there saved her exceptions at the time;

That the Court erred in ruling at the end of plaintiff's cause when plaintiff's evidence was all in and before the defendants opened their defense, that the defendant, William W. Eilers, was not liable upon the first count in plaintiff's petition, to which ruling of the Court this plaintiff objected and then and there saved her exceptions at the time;

That the Court erred in instructing the jury at the close of all the evidence offered by plaintiff, that the plaintiff was not entitled to recover against defendant, William W. Eilers, upon the first count in plaintiff's petition, and in instructing the jury that their verdict must be for the defendant William W. Eilers upon said count in said petition, to the giving of which instruction this plaintiff objected and then and there saved her exceptions at the time.

(Signed) GEORGE SAFFORD,
Counsel for Plaintiff."

130 And thereafter, to-wit, upon the 17th day of October, A. D. 1908, it being one of the days of the October, 1908, term of said court, and within four days after the rendition of said verdict, defendant filed its motion for a new trial; which said motion is in the words and figures following, to-wit:

"In the Circuit Court, City of St. Louis, October Term, 1908, Room 5.

No. 51928.

AGNES KETTELHAKE, Plaintiff,
v.
AMERICAN CAR AND FOUNDRY COMPANY, WM. E. EILERS, and QUINCY MARTIN, Defendants.

Comes now the defendant, American Car and Foundry Company, within four days after the rendering of the verdict of the jury in the above entitled cause, and moves the Court to set aside the verdict of the jury and to grant this defendant a new trial of said cause for the reasons following, to-wit:

1. The verdict is against the law.
2. The verdict is against the evidence.
3. The verdict is against the weight of the evidence.
4. The verdict is for the wrong party.
5. The Court erred in admitting improper, irrelevant and immaterial evidence offered by the plaintiff.
6. The Court erred in refusing to admit proper, material and relevant evidence offered by the defendant.
7. The Court erred in refusing to give the peremptory instruction in the nature of a demurrer to the evidence offered by this
131 defendant at the close of the plaintiff's case and again at the close of all the evidence in the case.
8. The Court erred in giving each and every instruction offered by the plaintiff and given by the Court.
9. The Court erred in giving each and every instruction given by the Court of its own motion.
10. The Court erred in refusing to give each and every instruction offered by this defendant and refused by the Court.
11. Court erred in refusing to sustain the application of this defendant for a removal of this cause to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, and erred in overruling and denying said application for a removal of said cause.
12. Because this Court, after the filing of this defendant's application for a removal of said cause to the United States Court and filing of its removal bond, had no jurisdiction to proceed further in this cause except to order the removal of said cause as prayed by this defendant, and because all of the actions of this Court taken in said cause after the filing of said application for removal and bond were without jurisdiction, this court having lost jurisdiction of this case after the filing of said application for removal and bond.
13. Because the action of this Court in denying this defendant's application for removal of said cause to the United States Court was in contravention of Section 2, Article 3 of the Constitution of the United States of America; which gives to the courts of the United States jurisdiction of causes and controversies existing between
132 citizens of different states—the defendant, American Car and Foundry Company, being a citizen and resident of the State of New Jersey and a non-resident of the State of Missouri, while the plaintiff was a citizen and resident of the State of Missouri and non-resident of the State of New Jersey.
14. Because the action of this court in refusing to sustain this defendant's application for a removal of said cause to the United States Court was in violation of Article 6 of the Constitution of the United States of America, which provides that the judges in every State shall be bound by the Constitution and laws of the United States.
15. Because the action of the Court in refusing to remove said cause to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri was in contravention and in violation of the Act of the Congress of the United States of

America, designated as Act of March 3, 1875, 18 Stat. 470, as amended by the Act of Congress of March 3, 1887, 24 Stat. 552; as corrected by the Act of Congress of August 13, 1888, 25 Stat. 433; which Act and the amendments thereto relate to the jurisdiction of the Circuit Court of the United States and the removal of cases from State courts to the courts of the United States of America.

16. Because by reason of the verdict of the jury in this case this defendant is about to be deprived of its property without due process of law, in violation of the fifth and fourteenth amendments to the Constitution of the United States of America, and in violation of Section 30 of Article 2 of the Constitution of Missouri in this, to-wit: that under and by virtue of the Constitution of the United States and the Acts of Congress above referred to in this motion,
133 this defendant had a right at the time that its application for a removal of said cause to the Circuit Court of the United States was filed, to have said cause removed to said Circuit — of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, and to have said cause tried in said United States Court, and that the act of this Court in denying said application prevented this defendant from having this cause tried according to the rights and privileges granted to it under the Constitution of the United States of America and the Acts of Congress above referred to.

17. Because this Court had no jurisdiction to complete the trial of this case or to submit it to the jury or to receive the verdict of the jury for the reason that this court had lost its jurisdiction of this case by the filing of the application and bond for a removal of said cause to the United States Court for the Eastern Division of the Eastern Judicial District of Missouri.

This defendant therefore moves the court to grant it a new trial of said cause.

WATTS, WILLIAMS & DINES AND
W. R. GENTRY,
Attorneys for Defendant,
American Car and Foundry Company.

That thereafter, to-wit, upon the 30th day of November, A. D. 1908, plaintiff filed a stipulation and motion to amend the record in this cause, which said motion and stipulation is in the words and figures following:

134 "STATE OF MISSOURI,
City of St. Louis, ss:

In the Circuit Court in and for the City of St. Louis, Missouri, October, A. D. 1908, Term, Room 5.

No. 51928.

AGNES KETTELHAKE, Plaintiff,
vs.
AMERICAN CAR & FOUNDRY COMPANY, WM. E. EILERS, and QUINCY MARTIN, Defendants.

Comes now the plaintiff in the above entitled cause and moves the court to amend the record of this court in the above entitled cause in accordance with the stipulation hereto attached, which said stipulation is hereby made a part of this motion.

(Signed) GEO. SAFFORD,
Attorney for Plaintiff.

"STATE OF MISSOURI,
City of St. Louis, ss:

In the Circuit Court in and for the City of St. Louis, Missouri, October, A. D. 1908, Term, Room 5.

No. 51928.

AGNES KETTELHAKE, Plaintiff,
vs.
AMERICAN CAR & FOUNDRY COMPANY, WM. W. EILERS, and QUINCY MARTIN, Defendants.

It is hereby stipulated and agreed by and between the parties to the above entitled cause as follows:

135 That the record in said cause shall be so amended that it may show that over plaintiff's objections the court sustained the demurrers to the evidence offered by defendants Quincy Martin and William W. Eilers at the close of plaintiff's case, to which ruling of the court plaintiff then and there saved her exceptions at the time;

That thereupon plaintiff asked leave to take an involuntary non-suit as to defendants Quincy Martin and William W. Eilers, with leave to move to set aside the same, and leave to take said non-suit was granted by the court and said involuntary non-suit with leave to move to set same aside was taken;

That thereupon the defendant American Car & Foundry Company orally asked for time to prepare and file a petition and bond for removal from the State to the Federal court, which time the court then and there granted;

That thereupon before said petition for removal and bond or

either of them was filed, plaintiff, by leave of court, orally moved the court to set aside the involuntary non-suit which plaintiff had taken as to Quincy Martin and William W. Eilers, which motion of plaintiff was then and there overruled, to which ruling of the court plaintiff then and there saved her exceptions at the time;

That thereupon the defendant, American Car & Foundry Company filed its petition for removal and bond;

That thereupon plaintiff filed her demurrer to said petition for removal, which said demurrer was then and there overruled by the court, to which ruling of the court plaintiff then and there saved her exceptions at the time;

136 That thereupon plaintiff filed her answer to said petition for removal;

That thereupon the court overruled said petition for removal from the State to the Federal court, to which ruling of the court defendant, American Car & Foundry Company, then and there saved its exceptions at the time.

(Signed) GEO. SAFFORD,
Attorney for Plaintiff.

(Signed) WM. R. GENTRY,
Attorney for Defendants."

And thereafter, to-wit, upon the 22nd day of December, A. D. 1908, the record in this cause was amended in accordance with the above stipulation.

And thereafter, to-wit, upon the 22nd day of December, A. D. 1908, it being one of the days of the December, 1908, term of said court, the court did enter of record an order overruling defendant, American Car & Foundry Company's, motion for a new trial.

To which action of the Court in overruling and denying said motion for a new trial defendant, American Car & Foundry Company, at the time duly objected and excepted, and still continues to except.

And on the same day, on the 22nd of December, 1908, the court did enter of record an order overruling plaintiff's motions to reconsider ruling on oral motion and motion to set aside involuntary non-suit and to reinstate cause upon docket as to each count as to William W. Eilers and Quincy Martin.

To which action of the Court in overruling and denying said motions as to defendants Eilers and Martin, plaintiff at the time duly objected and excepted, and still continues to except.

137 And thereafter, to-wit, upon the 6th day of January, A. D. 1909, and during the said December term, A. D. 1908, at which said motion for a new trial was overruled, defendant, American Car & Foundry Company, filed its affidavit for appeal; which was allowed to the Supreme Court of Missouri, and defendant American Car & Foundry Company was allowed until January 26th, 1909, to file its appeal bond in the sum of eleven thousand dollars and until February 5th, 1909, to file its bill of exceptions; and defendant upon said day, to-wit, the 6th day of January, 1909, deposited ten dollars as docket fee to the Supreme Court.

And thereafter, to-wit, upon the 15th day of January, 1909, defendant American Car and Foundry Company filed its appeal bond in the sum of eleven thousand dollars and the said bond was approved by the court.

And thereafter, to-wit, on the 28th day of January, 1909, plaintiff filed her affidavit for appeal from the judgment or decision of the Court as to defendant, Quincy Martin, upon the first count in her petition; which appeal was granted to the Supreme Court of Missouri, and plaintiff granted sixty days from this date to file her bill of exceptions.

And inasmuch as the foregoing matters do not appear of record, and in order that they may be preserved and presented on appeal, the defendant, American Car & Foundry Company, and plaintiff tender this, their joint bill of exceptions, and pray that the
138 same may be allowed, signed, sealed, filed and made a part of the record herein; which is accordingly done this 1st day of April, A. D. 1909.

M. N. SALE,
Judge of the Circuit Court,
City of St. Louis, Missouri (Div. No. 5).

Approved:

GEO. SAFFORD,
Counsel for Plaintiff.
WM. R. GENTRY,
Counsel for Defendant.

The above and foregoing is respectfully submitted as and for an abstract in lieu of full record in this case.

WATTS, GENTRY & LEE,
Attorneys for Appellant, American Car & Foundry Co.

(Here follow photographs marked pages 139-143.)

Pl. Ex. "A" for identification
E
S
W
V. YOUNG.
-14-08.

Pl Ex. B for identification
W
N
S
E
F. V. YOUNG

W
S
N
E

Pl. Ex "D"
W
S
E
F.V. YOUNG
3-14-08.

Ex. E
Brick annex room
N
V. YOUNG
3-14-08

144 STATE OF MISSOURI,
City of St. Louis, ss:

I, Jos. Flory, Clerk of the St. Louis Court of Appeals, hereby certify that the attached is a full, true and complete copy of Appellant's Abstract of the Record in the case of Agnes Kettelhake v. Amer. Car & F'dry Co. as the same remains on file in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said office this — day of ——, 1913.

[Seal of St. Louis Court of Appeals, Mo.]

JOS. FLORY, *Clerk.*

145 In the Supreme Court of Missouri, Division No. 1, October Term, 1911—January Call, 1912.

AGNES KETTELHAKE (Plaintiff), Respondent,
vs.
AMERICAN CAR & FOUNDRY CO. (Defendant), Appellant.

Appeal from the Circuit Court of the City of St. Louis, Missouri, Hon. M. N. Sale, Judge.

Respondent's Additional Abstract of Record.

George Safford, Attorney for Respondent.

146 In the Supreme Court of Missouri, Division No. 1, October Term, 1911—January Call, 1912.

AGNES KETTELHAKE (Plaintiff), Respondent,
vs.
AMERICAN CAR & FOUNDRY CO. (Defendant), Appellant.

Appeal from the Circuit Court of the City of St. Louis, Missouri.

Respondent's Additional Abstract of Record.

At the close of plaintiff's evidence, plaintiff filed an amended petition containing two counts, whereupon the defendants filed separate motions to elect as to each count, which motions were confessed by respondent, whereupon respondent, immediately and be-
147 fore defendants filed their demurrer to plaintiff's evidence, elected, as to the first count of her petition to stand upon the cause of action arising under what is now known as section 5425, R. S. Mo. 1909, and elected as to the second count of her petition to stand upon what is now known as sections 5426 and 5427, R. S. Mo. 1909, and thereupon the defendants, and each of them, withdrew their respective answers to plaintiff's original petition and re-filed the same as answers to plaintiff's said amended petition.

That when and immediately after defendants Martin and Eilers filed and asked the Court to give the peremptory instructions in the nature of demurrers to the evidence, plaintiff objected to the sustaining of said demurrers by the Court, whereupon the Court, by order of Court duly entered of record, overruled said objection and sustained said demurrers as to defendants Martin and Eilers, to which action of the Court in sustaining said demurrers, and each of them, plaintiff then and there excepted and still continues to except.

After plaintiff had taken involuntary non-suits as to defendants Martin and Eilers, and before non-suits and order granting same had been entered of record, plaintiff, by leave moved, orally, to set the same aside and reinstate the cause upon the docket as to defendants Martin and Eilers, upon the ground that the court erred in sustaining the demurrers to the evidence as to said defendants, which motion, over plaintiff's objection, by order of court duly entered of record, was overruled, to which ruling of the court plaintiff then and there objected and excepted.

Thereafter, on the 16th day of October, A. D. 1908, it being one of the days of the October, A. D. 1908, term of said court, and within four days after the involuntary non-suits as to defendants
148 Martin and Eilers were taken and within four days after and during the same term during which the verdict and judgment in said cause were rendered, plaintiff filed separate written motions praying the court to overrule the order theretofore made overruling plaintiff's motion to set said non-suits aside and reinstate, and further praying the court to set aside said non-suits as to defendants Martin and Eilers and reinstate the cause as to said defendants upon the docket as to the first count of her amended petition, and praying the court to grant plaintiff a new trial as to said defendants, which motions, by order of court duly entered of record, were on the 22nd day of December, 1908, one of the days of the December, A. D. 1908, term of said court, overruled.

Thereafter, on January 28, 1909, one of the days of the December, A. D. 1908, term of said court, plaintiff filed her application duly supported by affidavit, praying an appeal in said cause as to defendant Martin to the Supreme Court of Missouri, which appeal, by order of court duly entered of record, was thereupon allowed by the court, and plaintiff, by order of court duly entered of record in said cause on said day, was granted sixty days from said 28th day of January, A. D. 1909, in which to file her bill of exceptions.

Thereafter, on April 1, 1909, one of the days of the April, A. D. 1909, term of said court, plaintiff and defendant, American Car & Foundry Co., in open court, presented their joint bill of exceptions in said cause, which joint bill of exceptions was thereupon signed by the Judge of said court and, by order of court duly entered of record in said cause, approved, allowed, filed and made a part of the record. The abstract of said bill of exceptions as set forth in Appellant's Abstract of Record herein filed, is satisfactory in all respects, except as follows:

149 NICK ANASTAS testified:

Nick Anastas, an Albanian laborer in defendant's employ,

from the third story window of 2829 De Kalb street, at about four o'clock p. m., on January 23, 1908, saw a man, standing up, working upon and near (within arm's length of) the corner of a new freight car, one of the three cars that had been standing on a track in defendant's plant for several days, and then and there saw an engine with several cars attached moved along the track against said three cars, and move them some distance, so that the car said man was working upon then and there struck the said man and left him laying upon the ground hollering and waving his arms, whereupon witness immediately went a distance of about two hundred feet to Sam Caporal and told him that a man was hurt in the car shops, to go over there and see, and Caporal went right away.

Witness William F. Bade testified that when and for some time before Kettelhake was injured, he was paid by the American Car and Foundry Co.

The sentence, "It is the track shown on 'Exhibit A' that has the letters 'A' and 'S' by the rails," appearing at page 42 in the testimony of Alex. Slater, should be, "It is the track shown on 'Exhibit D' that has the letters 'T' and 'S' by the rails."

ALEXANDER SLATER testified:

That the middle of the car he was standing on was about two car-lengths from the point "M" on picture "D" when he got the signal from the foreman of his crew for the train to back down on the track, and that the line drawn on "Exhibit D" from the letter "A" to the letter "B" shows where Martin traveled during the time from the time when he gave the signal until the cars bumped.

150 That the defendants filed separate demurrers to the evidence as set out in Appellant's Abstract of Record, whereupon respondent objected to the sustaining of said demurrers, and each of them, which objections, as to the demurrers of defendants Martin and Eilers was overruled, and the demurrers to the evidence as to defendants Martin and Eilers were sustained, to which action of the Court in sustaining said demurrers plaintiff saved her exceptions at the time.

Thereafter, on January 28, 1909, one of the days of the December, A. D. 1908, term of said court and during the same term at which plaintiff's motion for a new trial as to defendant Martin was overruled, plaintiff filed her affidavit of appeal, which appeal, by order of court duly entered of record in said cause, was allowed to the Supreme Court of Missouri, and plaintiff, by order of court duly entered of record in said cause on said day granted sixty days from said 28th day of January, 1909, in which to file her bill of exceptions.

The above and foregoing is respectfully submitted as and for Respondent's Additional Abstract of Record in this cause.

GEORGE SAFFORD,
Attorney for Respondent.

151 STATE OF MISSOURI,
City of St. Louis, ss:

I, Jos. Flory, clerk of the St. Louis Court of Appeals, hereby certify that the attached is a full, true and complete copy of Respondent's Additional Abstract of Record, in the case of Agnes Kettlehake v. Amer. Car & F'dry Co. as same remains on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this — day of ——, 1913.

[Seal of St. Louis Court of Appeals, Mo.]

JOS. FLORY, *Clerk.*

152 STATE OF MISSOURI,
City of St. Louis, ss:

I, Joseph Flory, Clerk of the St. Louis Court of Appeals, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in Case No. 13475 of Agnes Kettelhake, plaintiff, respondent, against American Car & Foundry Company, a corporation, defendant, appellant, as fully as the same remains on file and of record in said case in my office; and that the original citation and writ of error are hereto attached and herewith returned.

In witness whereof, I have hereunto set my hand and affixed the seal of said St. Louis Court of Appeals, in the City of St. Louis, in the State of Missouri, this 28th day of March 1913.

[Seal of St. Louis Court of Appeals, Mo.]

JOS. FLORY,
Clerk of said Court.

153 [Endorsed:] No. 13475. Agnes Kettlehake, Defendant in Error, vs. American Car & Foundry Co., Plaintiff in Error Error to St. Louis Court of Appeals. Geo. Safford, Att'y for D. E. Watts, Gentry & Lee, Att'ys for P. E. Geo. D. Reynolds, P. J.; Albert D. Nortoni, J.; Wm. H. Allen, J.

Endorsed on cover: File No. 23,612. Missouri, St. Louis, Court of Appeals. Term No. 138. American Car & Foundry Company, plaintiff in error, vs. Agnes Kettelhake. Filed April 3d, 1913. File No. 23,612.

Office Supreme Court, U. S.
FILED
NOV 9 1914
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

AMERICAN CAR & FOUNDRY COMPANY,
Plaintiff in Error,
vs.
AGNES KETTELHAKE.
No. 188.

IN ERROR TO THE ST. LOUIS COURT OF APPEALS, STATE OF MISSOURI.

BRIEF OF PLAINTIFF IN ERROR.

M. F. WATTS,
WM. R. GENTRY,
EDWIN W. LEE,
Attorneys for Plaintiff in Error

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1919.

(23,612)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

AMERICAN CAR & FOUNDRY COMPANY,
Plaintiff in Error,
vs.
AGNES KETTELHAKE.
No. 138.

IN ERROR TO THE ST. LOUIS COURT OF APPEALS, STATE OF MISSOURI.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

The sole question to be presented to this Court in this case is: "Was the American Car and Foundry Company, a foreign corporation, entitled to remove the cause to the United States Court when plaintiff, a resident of Missouri, took a nonsuit as to resident defendants, in the midst of the trial?"

Agnes Kettelhake was the wife of Frank Kettelhake, a servant of the American Car and Foundry Company, employed at one of its plants in the City of St. Louis,

in the State of Missouri. On the 23rd day of January, 1908, Kettelhake was killed by the movement of a train of cars operated by the American Car and Foundry Company, in the yard adjacent to its plant, whilst Kettelhake was working on an unfinished car. On the 5th day of February, 1908, Kettelhake's widow, Agnes Kettelhake, a citizen and resident of Missouri, instituted suit in the Circuit Court of the City of St. Louis, Missouri, to recover damages for the killing of her said husband. In that suit three defendants were joined, namely, American Car and Foundry Company, a New Jersey corporation; William W. Eilers and Quincy Martin, the last two being residents and citizens of Missouri.

The original petition stated a joint cause of action against all three defendants. We lay special emphasis upon that fact at this time because it becomes material to inquire whether the defendant, American Car and Foundry Company, had any right of removal before the trial of the suit, which right would be waived if no timely application for removal was made. The original petition is set forth on pages 25, 26 and 27 of the printed record in this case. In that petition it was alleged that the defendant, American Car and Foundry Company, was a corporation under the laws of New Jersey and, **in conjunction with the defendants, Eilers and Martin,** controlled and operated a steam locomotive, switch yards, railway and plant for the purpose of manufacturing and repairing cars; that the plaintiff, Agnes Kettelhake, was the lawful wife of Frank Kettelhake, who, prior to his death, was in the employ of the **defendants** as a car repairer, and while he was engaged in his duties in repairing a car, the **defendants** caused his death. It is alleged that they did so (1)

by negligently omitting to instruct and require their employes to so mark the cars under or about which their employes were engaged in work that all persons would know whether or not persons were working under such cars; and (2) by negligently omitting to notify Kettelhake that defendants were about to move cars against and move the car under which he was working; and (3) by negligently omitting to discover that Kettelhake was under and repairing a car; and (4) by negligently causing the wheels and trucks of the car under which he was working to run over him. The original petition was in two counts. The allegations of each count were substantially the same, but in the first count plaintiff prayed damages in the sum of $10,000 in accordance with the provisions of section 2864 of the Revised Statutes of Missouri for 1899 as amended by an act entitled, "Damages and Contributions in Actions of Tort," pages 135 and 136 of the Laws of Missouri, 1905, while in the second count plaintiff prayed damages in accordance with the provisions of sections 2865 and 2866, of the same statutes as amended by an Act entitled, "Damages and Contributions in Actions of Tort," pages 252 and 253 of the Laws of Missouri, 1907. These statutes both provide for the recovery of damages by a widow for the negligent killing of her husband, section 2864, being known as the "penalty section" and providing for the recovery of damages in the sum of not less than $2,000 nor more than $10,000 in cases where the death was caused by the operation of a locomotive, car, steamboat, or street car, while sections 2865 and 2866 provide for the recovery of not exceeding $10,000 as damages for a negligent killing in any other manner, the first men-

tioned section being held by our Missouri courts to be both penal and remedial and the last section being purely compensatory.

During the trial an amended petition was filed by leave of court, which amended petition was in two counts. At the close of all the evidence offered in the case, the plaintiff dismissed as to the second count of the amended petition, so that we are now concerned only with the allegations of the first count thereof.

In the first count of the amended petition a joint cause of action was stated against the three defendants. It was alleged that the American Car and Foundry Company was a corporation organized under the laws of the State of New Jersey for the purpose of controlling, owning and operating a plant for the manufacture and repair of cars in the City of St. Louis, and licensed to do business in the State of Missouri, and that at all such times said defendant owned, and, in conjunction with the defendants Wm. W. Eilers and Quincy Martin, ran, conducted, managed, controlled and operated a steam locomotive, railway, switch yard and plant for the purpose of manufacturing, repairing and handling freight cars and passenger cars. It was then alleged that Frank Kettelhake was the lawful husband of Agnes Kettelhake, and that prior to his death he was in the employ of the defendants as a car builder, worker and repairer, and whilst working in the scope of his employment the defendants, by their agents and servants, ran, conducted, managed, controlled and operated the said steam locomotive and freight cars in the petition referred to, and, by their servants and agents by which said steam locomotive and cars were run, controlled, managed and operated, negligently

caused and permitted said steam locomotive and cars to so move that several of said cars ran against and moved a car which Frank Kettelhake was then and there dangerously near and repairing, and thereby, on the 23rd of January, 1908, negligently caused the last-mentioned car to run over the said Frank Kettelhake and so injure him that he died on the following day.

It is charged that it was the duty of the defendants, by their agents and servants in charge of their locomotive and cars, to exercise ordinary care not to permit said locomotive and cars, and especially the car near which Kettelhake was working, to move without first exercising ordinary care to discover and notify Kettelhake in time for him to reach a place of safety, and that the defendants and their servants and agents running such locomotive and cars, by the exercise of ordinary care, might have known of the presence of Frank Kettelhake at the place above described and his danger of being injured or killed, and that they neglected to exercise ordinary care to discover him and to notify him that the cars were about to be moved.

Plaintiff then sets forth the damages she has suffered and prays for damages in the sum of $10,000.00, in accordance with the provisions of Section 2864, Revised Statutes of Missouri 1909, as amended by an act entitled "Damages and Contributions in Actions for Tort," pages 135-136, Laws of Missouri, 1905.

The answers which had originally been filed as answers to the original petition were, by leave of Court, withdrawn and refiled as answers to the amended petition. The answers consisted of a general denial, coupled with a plea of contributory negligence on the part of Frank Kettelhake in failing to pay attention to his surroundings and keep a lookout for the approach of

engines and cars, and failing to listen and to heed warnings given of the approach of engines and cars.

The case was called for trial in the Circuit Court of the City of St. Louis on the 12th day of October, 1908. On the 13th day of October, 1908, plaintiff finished her case in chief, and as soon as she closed her side of the case each of the defendants requested the Court to give in its or his behalf a peremptory instruction to find for such defendant. Under the Missouri practice these peremptory instructions are commonly referred to as demurrers to the evidence. The Court announced that the American Car and Foundry Company's demurrer would be overruled, but the demurrers would be sustained as to the defendants Quincy Martin and William W. Eilers. Under the Missouri practice the plaintiff, under such circumstances, may either let a verdict go against him, pursuant to the Court's peremptory instruction, and then file a motion for new trial, and, when it is overruled, appeal to a higher court, or, to avoid a directed verdict, he may take a nonsuit. The latter course was adopted by plaintiff's counsel in the case at bar. As shown at page 55 of the printed record on file in this court, plaintiff's counsel said:

> "I take a nonsuit as to each count with leave to move to set the same aside and reinstate the cause upon the docket as to Quincy Martin and W. W. Eilers as to each count in plaintiff's petition."

Thereupon it was suggested by counsel for defendant American Car and Foundry Company that then for the first time there existed in this case an action by a resident of the State of Missouri against a defendant corporation organized under the laws of the State of New Jersey wherein the controversy was wholly be-

tween citizens of different states, the defendants Eilers and Martin, who were residents of Missouri, having just been let out of the case by the nonsuit which plaintiff had taken. Counsel for the American Car and Foundry Company at once asked the Court's indulgence for a sufficient length of time to prepare a petition for removal to the United States Court and a removal bond. When counsel for defendant returned to the court room with the removal petition and bond properly drawn up and executed, and before they were actually filed, plaintiff's counsel asked and obtained leave to move orally to set aside the nonsuit as to defendants Martin and Eilers. The plaintiff having thus obtained leave of Court to make this oral motion, it was made, as follows (see Rec., p. 56):

> "Mr. Safford: By leave of Court before the Clerk enters of record the nonsuits taken as to Martin and Eilers, I move the Court to declare that the oral motion of Mr. Gentry for removal did not state facts sufficient to constitute a cause for removal, and in addition to that move your Honor to set aside the involuntary nonsuit as to each count as to Quincy Martin and William Eilers, and as grounds for that motion state that the Court erred in making the ruling as to Quincy Martin and William Eilers."

The oral motion was thereupon overruled by the Court and the plaintiff saved her exceptions. It was admitted by counsel for plaintiff that the sureties on the removal bond were sufficient. The petition for removal and the removal bond were thereupon filed. Both the bond and petition were in usual form. The petition for removal charged that the cause was a civil suit for the recovery of damages for injuries to Frank

Kettelhake and that the cause is now wholly between citizens of different states; that the plaintiff, at the time of the commencement of the suit was, and still is a citizen and resident of the State of Missouri and a non-resident of the State of New Jersey, and that the defendant, American Car and Foundry Company, was, at the time of the commencement of said suit, and still is, a citizen and resident of the State of New Jersey and a non-resident of the State of Missouri, and that the matter and amount in dispute in said cause, exclusive of interest and costs, exceeds the sum or value of $2,000.00 (that being before the amendment passed by Congress raising the jurisdictional amount to $3,000.00 in removal cases). The facts that Eilers and Martin were residents of the State of Missouri and had originally been joined as codefendants, and that plaintiff had just taken a nonsuit as to them were also recited and a removal of the case to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri was prayed.

No question has ever been raised as to the sufficiency of the bond and it is sufficient to say that it was in the ordinary form required by the statutes of the United States in such a case.

The application for removal was thereupon denied by the Court and the American Car and Foundry Company, plaintiff in error, duly preserved its exceptions in the manner required by Missouri law.

Counsel for plaintiff in error deem it unnecessary to set forth a detailed statement of the evidence concerning the manner in which Frank Kettelhake came to his death, further than to say that the evidence offered by plaintiff tended to support the allegations of her petition and tended to show that whilst Kettelhake

was engaged in his work, and in a position where the approach of cars would not naturally be noticed by him, the switching crew, of which Quincy Martin was foreman, pushed a cut of cars around a curve in the track and against some standing cars, causing them to move so that the car under which Kettelhake was working ran over him and killed him, and that no warning of any kind was given to Kettelhake of the approach of the engine and cars above referred to. The evidence offered on the part of the defendants tended to show that a warning was given.

The case was submitted to the jury on instructions given by the Court at the request of the respective parties and the jury returned a verdict in favor of plaintiff, against defendant, American Car and Foundry Company, for the sum of $5,400.00. A motion for a new trial was filed by defendant American Car and Foundry Company within the time permitted by the Missouri practice, and in said motion said defendant set up that the Court erred in refusing to sustain defendant's application for the removal of this cause to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, and erred in overruling and in denying said application for the removal of said cause. The acts of Congress relating to the removal of causes, and the provisions of the Constitution of the United States, and the amendments thereof, which said defendant claimed had been violated by the denying of said application were specifically referred to in the motion for a new trial. The trial court overruled the motion and an appeal was duly prosecuted by the defendant, American Car and Foundry Company, to the Supreme Court of Missouri, which, at that time, had exclusive jurisdiction of all

such cases involving more than $4,500.00, exclusive of interest and costs. Before the appeal was reached by the Supreme Court of Missouri an amendment was passed changing the jurisdiction of the appellate courts of Missouri so that in such a case as this arising in the City of St. Louis the St. Louis Court of Appeals had jurisdiction up to $7,500.00, unless a case involved a construction of the Constitution of Missouri or the Federal Constitution, or some Act of Congress.

The case was briefed and argued in the Missouri Supreme Court, but that court held that since, so far as the amount involved was concerned, the St. Louis Court of Appeals then had exclusive jurisdiction, and since there was no constitutional question involved and no question involving the validity of any provision of the Federal Constitution, or of any Act of Congress, the Supreme Court of Missouri no longer had jurisdiction of the case and it transferred the same to the St. Louis Court of Appeals, where, after consideration by that court, the judgment of the Circuit Court of the City of St. Louis was affirmed. The opinion of the Supreme Court of Missouri will be found in the printed record at pages 6-9, inclusive, and that of the St. Louis Court of Appeals at pages 10-16, inclusive. After a motion for a rehearing had been overruled by the St. Louis Court of Appeals, that being the highest court of Missouri to which the case could be carried, the American Car and Foundry Company sued out a writ of error to this court, which writ was issued by the Clerk of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and allowed by the Hon. George D. Reynolds, Presiding Judge of the St. Louis Court of Ap-

peals. Citation was duly issued by the said Presiding Judge and service thereof was acknowledged by the defendant in error, through her attorney of record, and plaintiff in error gave a proper bond, which was duly approved.

It should also be stated that the plaintiff below, within the time allowed by Missouri statutes, to-wit, within four days after the verdict of the jury was rendered, filed her motion praying the Court to set aside the nonsuit she had taken as to defendants Martin and Eilers and for a new trial as to them. That motion was overruled and plaintiff appealed to the Supreme Court, where her appeal is still pending.

As stated at the beginning of this statement, the sole question which we are bringing up to this court is whether or not the American Car and Foundry Company was entitled to have the case removed to the United States Circuit Court (as it was then, before the amendment abolishing the Circuit Court), which right was denied by the trial court.

SPECIFICATIONS OF ERROR.

I.

The St. Louis Court of Appeals erred in holding that the trial court, to-wit, the Circuit Court of the City of St. Louis, did not commit error in denying the application of plaintiff in error for the removal of said cause to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

II.

The St. Louis Court of Appeals erred in its construction of the Acts of Congress known as the Removal Acts, and in so construing said Removal Acts as to

hold that the plaintiff in error was not entitled to remove this cause to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

III.

The St. Louis Court of Appeals erred in affirming the judgment against the plaintiff in error, because the trial court in which said judgment was rendered had lost jurisdiction of said case by the filing of an application for removal and the removal bond by plaintiff in error, and the action of said trial court, in proceeding to finish said trial and render judgment against said defendant was void for lack of jurisdiction of the plaintiff in error.

ARGUMENT.

The three specifications of error may be properly argued together, for the substance of each one of them is that the plaintiff in error was improperly denied its right of removal to the United States Circuit Court, and forced to submit to the jurisdiction of the Missouri courts.

We respectfully submit that the trial court erred in denying the application for removal to the United States Court and the St. Louis Court of Appeals, because of that error on the part of the trial court, committed error in affirming the judgment.

Ordinarily, on the first day of the term of court to which a suit is returnable, a non-resident defendant makes application for removal to the United States Court, when the jurisdictional facts pointed out in the removal act exist, and such non-resident defendant desires to remove the cause. But in this case it was impossible for plaintiff in error to secure a removal of the cause at the usual time for the reason that the petition which was filed at the time of the institution of the suit clearly stated a joint cause of action against all of the defendants. In the petition for removal the fact is recited that the defendants, Eilers and Martin, were, and are, residents of the State of Missouri (see Printed Record, page 57). The allegations of the petition for removal must be accepted as true in passing upon the right to remove.

Since the individual defendants were residents of Missouri, a joint cause of action being stated against them and the non-resident defendant, an application to the Circuit Court of the City of St. Louis, Missouri,

by plaintiff in error to remove the cause on the first day of the return term would necessarily have been denied. In determining whether or not a joint cause of action is stated, the Court will look to the allegations of the petition alone and the courts of the United States will, in considering whether or not a joint cause of action is stated, determine the question according to the rules laid down by the highest court of the State in which the suit originated. By looking to the allegations of plaintiff's original petition, it will be readily seen that without doubt a joint cause of action was stated therein. The petition (Printed Record, pp. 25-27) charged, in effect, that all three defendants in conjunction with one another were operating a plant for the manufacture of cars and using in connection therewith switching yards, a locomotive, a railway and various cars, and that Kettelhake was employed by all three of the defendants. It was, in effect, charged that the three masters thus operating together violated their duty to the servant, Kettelhake, by failing to exercise ordinary care to furnish him a reasonably safe place in which to work. That is shown by the allegation that the defendants negligently omitted to instruct and require their employes to so mark the cars under which the employes of defendants were working or were about to work that all persons would know whether or not persons were working under such cars. Now, bearing in mind that the petition charges all three defendants with being masters of Kettelhake and that Kettelhake was a servant of each and every one of them, it requires no authorities to convince any court that this charge is a charge of joint negligence on the part of the three defendants, for, according to the allegations, each of the

three defendants stood on the same footing as an employer or master, and each violated the duty owed by a master to his servant. In other words, what one did, they all did—what one omitted, they all omitted. A clearer charge of joint negligence could not be found in any case.

The second charge of joint negligence on the part of all the defendants, found in the original petition, is to the effect that all of them negligently omitted to notify Kettelhake that the defendants were about to move cars against and move the car under which he was working. According to this allegation, each and every one of the defendants was engaged in the act of preparing to move the cars in question and in such a manner that Kettelhake would be likely to be injured, and, under such circumstances, as each and every one of those defendants was the master of Kettelhake, the duty rested upon each and every one of them to notify him of the impending peril caused by the force which they were setting in motion.

And, lastly, it was alleged that all of the defendants negligently caused the wheels and trucks of the car under which he was working to run over him. Each and every one of the foregoing allegations stated a clear charge of joint negligence on the part of all of the defendants.

It may be suggested by counsel for defendant in error that the plaintiff in error could have charged that the two individual defendants were fraudulently joined and could have sought removal on that ground at the return term of the cause in the State Court. If such an attempt had been made and the cause had in fact been removed, it would necessarily have been remanded to the State Court, and the probability is that the State

Court would never, in the first place, have removed it to the United States Court because, under the decisions of this court, where a plaintiff has a joint cause of action against a corporation and one of its employes, the mere fact that plaintiff knows that, on account of the insolvency of the guilty employe, it will be impossible to collect a judgment against him, does not deprive the plaintiff of the right to join such employe and state a joint cause of action against him and the corporation, even though the real object in joining him is to keep the case in the State Court, and in such a case it is only where the employe is fraudulently joined and where in fact not even a color of a joint cause of action exists against him and the corporation that a removal to the United States Court can be upheld. For example, if in this case the defendant, American Car and Foundry Company, had known that the defendants, Quincy Martin and Eilers, were not present on the occasion of the accident to Kettelhake, had nothing whatever, even remotely, to do with the accident, and that plaintiff could not possibly procure any proof of the allegations concerning their participation in the movement of cars which killed Kettelhake, then, although a joint cause of action was stated, the American Car and Foundry Company could properly have asked a removal to the United States Court on the ground of fraudulent joinder, making proper allegations of facts in its application for removal, concerning the fraudulent joinder of Martin and Eilers, and it would have been the duty of the State Court, if the facts were fully set forth in the application, to remove it to the United States Court, and that would have been the proper tribunal to try the

question of fact concerning the alleged fraudulent joinder.

Ches. & Ohio Ry. v. Cockrell, 232 U. S. 146.

But the American Car and Foundry Company never has contended, nor does it now contend, that there was in law a fraudulent joinder of Quincy Martin as a co-defendant. Plaintiff's evidence and that of the car company, as well, showed that Quincy Martin was in charge of the cut of cars which caused the death of Kettelhake and that he himself gave the signal which caused the movement of the cars, resulting in the unfortunate accident to Kettelhake. Knowing this to be a fact, it would have been folly for the American Car and Foundry Company to attempt removal at the return term of court on the ground of fraudulent joinder, for when these facts appeared the Court would have been bound to hold that it was for the jury and not for the Court to determine, in view of the conflict of evidence, whether or not Martin acted negligently in doing what he did, as, for example, failing to give warning to Kettelhake and failing to learn of Kettelhake's presence beneath the car, plaintiff's evidence showing failure to warn and defendant's evidence showing warning. It was held in the case just cited that where the servant who was joined as a co-defendant was actually present at the scene of the accident and running the train of the corporation defendant, the United States Court would not declare that there was a fraudulent joinder of such individual defendant, even though his evidence tended to show that he was not negligent as charged.

Ches. & Ohio Ry. v. Cockrell, 232 U. S. 146.

Nor could it have availed anything for the American

Car and Foundry Company to contend that because the allegations of the petition charged Martin and Eilers with being co-employers with the American Car and Foundry Company and the proof would show that Martin was a servant of the corporation, therefore the American Car and Foundry Company would be entitled to remove the case. The Court would have disregarded the legal conclusions stated in the petition and would undoubtedly have held that whatever might be said as to the relations existing between the parties, nevertheless if Martin, whether as servant or as master, did, or helped to do, the negligent acts charged, he was jointly liable with the American Car and Foundry Company, and, therefore, removal would necessarily be defeated as long as Martin remained in the case. Even if Martin and Eilers be considered as servants rather than as masters the acts they were charged with committing were, as to some of them, at least, acts of misfeasance, not mere non-feasance. A servant whose misfeasance causes injury to another servant is jointly liable with his master for such misfeasance, though not for non-feasance; and Martin was charged with misfeasance.

Jewell v. Bolt & Nut Co., 231 Mo., *l. c.* 206-207;
McGinnis v. Railroad, 200 Mo. 347;
Harriman v. Stowe, 57 Mo. 93;
Edge v. Railroad, 206 Mo. 471;
Lanning v. Ry., 196 Mo. 647;
Chicago, R. I. & Pac. Ry. v. Schwyhardt, 227 U. S. 184.

Whether the petition states a joint cause of action is a question of state law.

Chicago, R. I. & Pac. Ry. v. Schwyhardt, 227 U. S. 184;
Ches. & Ohio Ry. v. Cockrell, 232 U. S. 146;
C., R. I. & P. Ry. v. Dowell, 229 U. S. 102.

We repeat, that it would have been impossible for the American Car and Foundry Company to have removed the cause to the United States Court so long as the three defendants were in the case, because, while such was the fact, it could not be said that the controversy was wholly between citizens of different states, nor could it be said that there was a separate and separable cause of action so far as the American Car and Foundry Company was concerned, because the allegations of the petition charged joint negligence.

Therefore, up to the time when plaintiff took a nonsuit as to the individual defendants, Martin and Eilers, there was never a moment, from the time of the institution of the suit, when the right of removal existed. Hence, plaintiff in error was in no way guilty of neglect nor out of time in making its application for removal, nor had the right of removal been waived or lost by reason of not having been exercised earlier.

Powers v. Chesapeake & Ohio Ry. Co., 169 U. S. 92;

Fritzlin v. Boatmen's Bank, 212 U. S. 364.

In determining the effect of an action taken in a proceeding in a Missouri court, this court, we respectfully submit, will accept, as binding upon it, the construction placed by the Missouri court of last resort, to-wit, our Supreme Court, upon the statutes and rules of procedure in force in Missouri. Fortunately for the plaintiff in error, the Missouri Supreme Court has repeatedly committed itself in no uncertain terms as to the effect of a nonsuit, whether voluntary or involuntary. In the case of

Wiethaupt v. St. Louis, 158 Mo. 655,

the Court had before it a case where the plaintiff below

sued the City of St. Louis and a contractor named Prendergast, charging them jointly with negligence in leaving a large pipe, intended for use in a sewer, lying upon one of the public streets in the City of St. Louis, so that when plaintiff came driving along the street in the night time he drove against the pipe, and his horse was thereby frightened and caused to run away and injure the plaintiff. The opinion of the Court shows that at the trial, when plaintiff's testimony had all been offered, each of the defendants demurred separately, and the Court gave a peremptory instruction in favor of the defendant, Prendergast, and refused that offered by the city. Thereupon the plaintiff took a nonsuit with leave to move to set the same aside, as to Prendergast, and the trial proceeded against the city and resulted in a verdict and judgment in plaintiff's favor. From that judgment the city appealed. In considering this appeal, and particularly the complaint by the city that the Circuit Court had committed error in nonsuiting the plaintiff so far as defendant Prendergast was concerned, the Supreme Court, at page 659, said:

> "A judgment of nonsuit is a complete determination of the suit, but not an adjudication of the merits of the controversy."

In support of its ruling, after citing two Missouri cases, the Court cites:

6 Ency. Pl. & Prac. 978.

Turning to that citation we find the following:

> "A dismissal, discontinuance or nonsuit in a legal proceeding, without a trial upon the merits, operates as a final determination of the suit and carries the entire cause out of court and all the parties to the original proceeding."

In the case of

Mason v. Railroad, 226 Mo. 212,

the Court held that an involuntary nonsuit was, in legal effect, a dismissal.

In the case of

Wetmore v. Crouch, 188 Mo. 653,

the Supreme Court of Missouri said:

> "It has practically been held that the word 'nonsuit' in the section involved means any judgment of discontinuance or dismissal whereby the merits are left untouched."

And then the Court cited with approval the Wiethaupt case.

Other cases in Missouri holding to the same effect are:

Waterworks Co. v. School District, 23 Mo. App., *l. c.* 235;
West v. McMullin, 112 Mo., *l. c.* 409, 410;
Hudson-Kimberly Pub. Co. v. Young, 90 Mo. App., *l. c.* 513;
Meddis v. Wilson, 175 Mo. 126, *l. c.* 133;
Wing v. Ins. Co., 167 Mo. App., *l. c.* 18.

In the case of Hudson-Kimberley Pub. Co. v. Young, 90 Mo. App. 505, the Kansas City Court of Appeals considered a case where a suit was brought to enforce a judgment rendered in the State of Kansas. It appears from the statement of facts that suit had been brought against the defendant in Lafayette County, Missouri, and that the plaintiff therein had suffered a nonsuit. Subsequent to that, certain fat cattle belonging to the defendant were found in the State of Kansas and attached by plaintiff and on the judgment thus obtained suit was brought by the plaintiff against the

defendant in the Circuit Court of Lafayette County, Missouri. The defendant contended that the original judgment of nonsuit, in the first suit brought in Lafayette County, was a final determination of the case. The Kansas City Court of Appeals said:

> "It may be well, however, to call attention to the claim of the defendant that the nonsuit taken by plaintiff in the Circuit Court of Lafayette County, Missouri, was *res adjudicata*, under the laws and decisions of the courts of this state, and that the Kansas court was in error in not so holding. We think the Kansas Court, in that respect at least, conformed to the established rule in this state that an involuntary nonsuit is merely a dismissal of the plaintiff's cause of action, when it is taken before the cause is finally submitted to the jury, or the Court sitting as a jury, or the Court."

This court has also recognized the fact that a dismissal and a nonsuit are one and the same thing, in effect. In the case of

Haldeman *et al.* v. United States, 91 U. S. 585,

this court, in considering certain pleas contained in an answer by a defendant therein, in which the defendant claimed the action was barred by reason of proceedings which had been had in a former case where the record entry was that "the said suit is not prosecuted and be dismissed," said, through Mr. Justice Davis:

> "The first, second and fourth pleas are not essentially different. In each the judgment relied on is that 'the said suit is not prosecuted and be dismissed.' This entry is nothing more than the record of a nonsuit, although the customary technical language is not used."

From the foregoing decision it seems to us to be con-

clusively established that when plaintiff took her nonsuit as to the two individual defendants, Martin and Eilers, it had the very same effect, so far as the stage of the proceedings was then concerned, as if she had entered a voluntary dismissal as to the defendants named.

When she took such nonsuit, those defendants were out of the case. Then the controversy was wholly between Mrs. Kettelhake, a resident of Missouri, and the American Car and Foundry Company, which is admittedly a non-resident corporation, and the amount in dispute was ten thousand dollars ($10,000). Suppose plaintiff had voluntarily dismissed as to defendants Eilers and Martin at any time before the case was submitted to the jury. There can be no doubt that the defendant American Car and Foundry Company would then immediately have become entitled to the right to remove the cause to the Federal Court.

Powers v. Chesapeake & Ohio Ry. Co., 169 U. S. 92.

In the Powers case the plaintiff voluntarily discontinued the case as to the individual defendants who resided in the State where the action was pending. We think the plaintiff's counsel will admit that if her action in taking the nonsuit was a voluntary action, the right of removal arose as soon as the action was taken and the removal was consummated upon the filing of the petition for removal accompanied by a proper bond. But plaintiff's counsel contended, and the Missouri courts adopted his view, that the taking of an involuntary nonsuit under the circumstances above related in this case did not take the defendants Eilers and Martin out of court in such a way as to leave the

American Car and Foundry Company as the sole defendant in the case.

In the case of Kansas City Suburban Belt Railway Company v. Herman, 187 U. S. 63, this Court at first blush seems to favor the plaintiff's contention in the case at bar. But on careful examination we submit that that case is no authority against our position, but is in perfect harmony with our contention. In the Herman case the suit was brought by a minor who was a resident of Kansas, against the Union Terminal Railway Company, a corporation of Kansas, and the Kansas City Suburban Belt Railway Company, a corporation of Missouri, to recover damages for injuries inflicted through their joint or concurrent negligence. The case was tried and at the close of the evidence for plaintiff each company filed its separate demurrer to the evidence. The Court sustained the demurrer of the Terminal Company, which was the Kansas corporation, and overruled the demurrer of the Belt Company, which was the Missouri or non-resident corporation. The Belt Company thereupon filed its application for removal to the Federal Court. The removal was denied, the plaintiff recovered and the case was carried on writ of error to this court. It was held by the Supreme Court of the United States that the case was distinguishable from the case of Powers v. Chesapeake & Ohio Railway Company, above cited, because in the Powers case the action as to the resident defendant was voluntarily discontinued, while in the Herman case the joint liability was insisted on to the close of the trial. There is no recital anywhere in the decision of the Herman case to the effect that when the demurrer had been sustained the plaintiff in the trial court took a nonsuit as to

the resident defendant. On the contrary, it is expressly stated at page 69 of the opinion "that the joint liability was insisted on here to the close of the trial and the non-liability of the railway company was ruled *in invitum.*" Now, in the case at bar, if the counsel for plaintiff had not taken a nonsuit, but had kept the two individual defendants in the case until the close of the trial, at which time the jury under the instructions of the Court would have been obliged to return a verdict in favor of the two individual defendants, then the case would have been on all fours with the Herman case, and the ruling in that case would have covered this case. Under our practice in Missouri plaintiff had the option either to keep the two individual defendants in court to the close of the case, except to the instructions of the Court directing a verdict in their favor, file a motion for a new trial and when it was overruled, appeal the case as to those two individual defendants, or to take a nonsuit (we care not whether it be called a voluntary or an involuntary nonsuit), and thus take the two individual defendants clear out of the case. The latter course was pursued voluntarily by plaintiff's counsel. When we say "voluntarily", we do not mean to mislead the Court or misstate the facts. It was in a sense an involuntary nonsuit, for it was taken in order to avoid a verdict in favor of those two defendants and was taken with leave to move to set aside the nonsuit. But for the purposes now under consideration, the action of taking the nonsuit was voluntary in the sense which will distinguish this case from the Herman case. As above stated, the plaintiff could have kept the individual defendants in or let them out by a nonsuit. Plaintiff's counsel had his own choice as to the two methods to pursue.

It has always been the law in Missouri that a trial court has no power to force plaintiff to a nonsuit. The most the Court can do is to direct a verdict against plaintiff. If plaintiff wants to keep the defendant in he can do so, or he can let a defendant out by nonsuit. But the Court can never require him to take a nonsuit.

Walls v. Gatey *et al.*, 8 Mo. 685;
Clark v. Steamboat Mound City, 9 Mo. 146;
Same v. same, 9 Mo. 148;
Welles v. Biddle, 9 Mo. 169;
Clark's Admx. v. Ry., 36 Mo. 215, 216.

Plaintiff's rights would have been in no way sacrificed if her counsel had not seen fit to take a nonsuit, but had kept the two individual defendants in, for the right of appeal would have existed in her favor at the close of the case in the Circuit Court. Plaintiff's counsel contended, and will doubtless again urge that contention in this court, that because the nonsuit was taken with leave to subsequently move to set it aside, that permission or leave granted by the Court acted as a chain to hold the defendants, Eilers and Martin, in the case. This contention is unsound. No matter if plaintiff did subsequently try to bring Eilers and Martin back into the case, they were out when the nonsuit was taken. If they were not out, why the necessity of asking leave to bring them back in again? Plaintiff's counsel seemed to realize before the application and bond for removal were actually filed that there was danger of the removal of the case being granted because Eilers and Martin were out, for he immediately proceeded to take steps to knock at the door of the court of justice and ask leave to bring those defendants back in again. He was careful to have the record show, as

it does, that he orally moved the Court to set aside the nonsuit and reinstate the cause as to the two individual defendants, Eilers and Martin, before the petition for removal was actually filed. If they were still in the suit there could have been no need whatever to try to get them in at that time. If they were out, as they undoubtedly were by reason of plaintiff's having taken a nonsuit as to them, then the only way to get them back in again was to follow the statute and file a written motion within four days asking the Court to set aside the nonsuit and grant the plaintiff a new trial as to those defendants. Our position is that the right of removal attached at once upon the taking of the nonsuit, and that the moment the petition and bond were filed the case was *ipso facto* removed. It has been held that where a proper case for removal exists and the proper application and bond are filed, the case is thereby removed to the Federal Court just as effectively as if the trial court made an order directing the removal.

The right of removal must be determined in this case by the situation as it existed at the moment when the application for removal and the removal bond were filed.

C., B. & Q. Ry. Co. v. Willard, 220 U. S. 415, *l. c.* 426;
Wilson v. Oswego Tp., 151 U. S., *l. c.* 67;
Barney v. Latham, 103 U. S. 205.

If it existed then, the plaintiff could not, by any subsequent act, destroy the right of removal. That is to say, if the right of removal existed because plaintiff had taken the individual defendants out of the case by a nonsuit, she could not subsequently destroy the right of removal by filing a motion within four days after the

verdict, asking the Court to bring those defendants in by setting aside the nonsuit and granting a new trial as to them. It is true that plaintiff did, within four days, file such a motion as to each of the individual defendants, but, as above stated, that is wholly immaterial to a proper determination of the question of the right of removal. We insist that defendants Eilers and Martin were as completely out of the case at the time of the filing of the application for removal and the removal bond as if they had never been joined as defendants in the case, or as if plaintiff had voluntarily dismissed as to them without waiting for any adverse action of the Court on the demurrers to the evidence.

Not only is this shown to be true by the Missouri decisions above cited, it is plainly apparent that it must be so. Suppose, for example, when the defendant American Car and Foundry Company finished offering its evidence, the same counsel who represented it and the defendants Eilers and Martin (for they all had the same counsel) had stated to the Court, "We now desire to offer evidence as to the defendants, Eilers and Martin, to exonerate them from liability in this case". The Court would certainly have ruled that such evidence could not be offered by those defendants, because they were out of the case. Suppose after the jury went to their jury room one of their number had suggested that the plaintiff ought to have a verdict against Eilers or Martin, or both of them, as well as against the American Car and Foundry Company, and that after discussing that question the jury had returned to the court room and asked the Court whether or not they could render such a verdict against either of the individual defendants. The Court would have been obliged to reply that no verdict could be rendered against either of those defendants for the reason that

they were out of the case. Now, if they were out of the case so that they could not offer any defense after the nonsuit was taken, and out of the case so that the jury could not return a verdict one way or the other as to either of them, because the nonsuit had been taken, we earnestly submit that they were out of the case for all purposes, and with those two defendants out, there was only one defendant left, and that was the non-resident defendant, the plaintiff in error, the American Car and Foundry Company. Nor can it be successfully urged that because of the mere fact that at some time subsequent to the conclusion of the trial those individual defendants might possibly have been brought back into the case on proper steps being taken by plaintiff's counsel, therefore they could not be considered out of the case at the time when the application for removal was filed. That fact alone is not sufficient to enable the Court to hold that they were still in the case. Suppose, for example, plaintiff had voluntarily dismissed as to those two individual defendants without being led to do so by any adverse ruling of the Court, and at the close of the case the jury had disagreed and been discharged and the case had been continued awaiting another trial. Suppose before the next term of court arrived plaintiff had discovered additional evidence which in her judgment was sufficient to enable her to get the Court to hold that Eilers and Martin were liable. She could have filed an amended petition, made them parties defendant, had a summons issued for each one of them, and thus have brought them back into court in the very same case as that from which they were originally dropped. Nobody would contend that such a possibility to get those defendants back into court would defeat the right of removal which existed at the moment when she took a nonsuit

as to those defendants. But there is nothing else in this case that can be urged as a reason why defendant American Car and Foundry Company had no right to remove the case, except that the defendants Eilers and Martin were not completely out because plaintiff had a right to ask to have them brought back into the case. We have critically examined all of the authorities we have been able to find which hold as the Court held in the case of Kansas City Suburban Belt Railway Company v. Herman. There is not one of those cases where we have found, from the statement of this Court, that when the demurrer was sustained the plaintiff took a nonsuit as to the resident defendant. We, therefore, say that in all of those cases the ruling of this Court should be considered in view of the fact that such individual defendants never got out of the case, even for one moment, but were in at all times to the very close of the trial of the case. Those cases are therefore distinguishable from the case at bar, where, as above pointed out, the two resident defendants were out of the case when the application for removal was filed. Plaintiff could have kept them in by not taking a nonsuit. They would then have been in to the very close of the case, for the verdict of the jury could not then have been complete without making a finding one way or the other as to those two defendants. But, as we have stated, after the nonsuit was taken, there could have been no verdict one way or the other by the jury as to either of those resident defendants and hence the case proceeded from the moment of the taking of the nonsuit to the close of the trial with those defendants clear out of court. We judge from the action of plaintiff's counsel at the trial that he will contend that the resident defendants were not out of court until the clerk had entered the order granting the non-

suit. But we insist that plaintiff's counsel's own actions show that he has not much faith in that contention, and he is practically estopped from urging it, for he immediately began to ask leave to get the individual defendants back in again, which would have been wholly unnecessary had they not been out.

The action of the trial court and of the St. Louis Court of Appeals deprived this defendant of the right of removal in violation of the Act of Congress designated as an Act of March 3rd, 1875, 18 Stat. 470, as amended by the Act of Congress of March 3rd, 1887, 24 Stat. 552, as corrected by the Act of Congress of August 13, 1888, 25 Stat. 433.

By reason of the right of removal of this case, upon the filing of the petition and bond for removal, which were actually filed at the proper time, the Circuit Court of the City of St. Louis lost its jurisdiction and from that moment on all of the acts of the Circuit Court in this case were *coram non judice*. The plaintiff in error, we respectfully submit, is therefore entitled to have the judgment of the St. Louis Court of Appeals affirming the judgment of the Circuit Court of the City of St. Louis reversed and to have the cause remanded to the Circuit Court with directions to set aside the order denying the American Car and Foundry Company's application for removal and enter an order removing said cause to the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri. That order is respectfully prayed for by plaintiff in error.

Respectfully submitted,

M. F. WATTS,
WM. R. GENTRY,
EDWIN W. LEE,
Attorneys for Plaintiff in Error.

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FILED
JAN 14 1915
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

AMERICAN CAR & FOUNDRY COMPANY,
Plaintiff in Error.
vs.
AGNES KETTELHAKE,
Defendant in Error.

No. 138.

IN ERROR TO THE ST. LOUIS COURT OF APPEALS, STATE OF MISSOURI

Brief of Agnes Kettelhake.

GEORGE SAFFORD,
Attorney for Agnes Kettelhake,
Defendant in Error.

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Brief of Agnes Kettlehake.

STATEMENT.

The statement of plaintiff in error to the effect that the sole question to be presented to this Court in this case is: "Was the American Car & Foundry Company, a corporation, entitled to remove the cause to the United States court when plaintiff, a resident of

Missouri, took a non-suit as to the resident defendants, in the midst of the trial?" is not quite correct. We respectfully submit that in view of the record in this case the sole question to be presented to this Court in this case is: Was the American Car & Foundry Company, a foreign corporation, entitled to remove the cause to the federal court when, at the close of plaintiff's case, by reason of the fact that the Court, over plaintiff's objection and exception, sustained a demurrer to plaintiff's evidence as to the local defendants, plaintiff took an involuntary non-suit as to them, **with leave to move to set the same aside and reinstate the cause upon the docket** and in due time moved to set the involuntary non-suit aside and reinstate the cause, and appealed, and thereby, under Missouri procedure, kept the local defendant, Martin, in court, to procure a judgment against him **in this case.**

Plaintiff's original petition contained two counts, each of which stated a joint cause of action under Sec. 2864 and a joint cause of action under Secs. 2865 and 2866, R. S. Mo. 1899. At the close of plaintiff's case (53), plaintiff filed an amended petition, containing two counts, each of which stated a joint cause of action under Sec. 2864 and a joint cause of action under Secs. 2865 and 2866, R. S. Mo. 1899, and then, in compliance with defendant's motion, elected to stand upon the cause of action arising under Sec. 2864 with reference to the first count, and upon the cause of action arising under Secs. 2865 and 2866 with reference to the second count of her petition. To this amended petition each of the defendants refiled their original answers, whereupon plaintiff refiled her original replies to each of said answers. Each of the

defendants then filed their separate demurrers to the evidence and after hearing arguments on both sides the Court said:

> "I sustain the demurrer as to Quincy Martin and W. W. Eilers."

To which action of the Court, in sustaining said demurrers, plaintiff, by her counsel, then and there saved her exceptions which were allowed by the Court.

Plaintiff, believing she would be able to get the Court, on motion, to set aside its order sustaining the demurrer to the evidence and grant her a new trial, then took an involuntary non-suit as to the local defendants as to each count, **with leave to move to set the same aside and reinstate the cause upon the docket.** Defendant, American Car & Foundry Company, thereupon asked for time to prepare and file a petition and bond for removal. Thereafter and before either the petition for removal or bond was filed plaintiff asked the Court to set aside the non-suit as to the local defendants so she might reduce the case to judgment as to them at that time, relying upon Collier vs. Swinney, 13 Mo. 478, but the trial court, contrary to the ruling in that case, over plaintiff's objection and exception, overruled plaintiff's motion, to which ruling of the Court plaintiff then and there saved her exceptions. Thereupon the defendant, American Car & Foundry Company, filed its petition for removal to the federal court, alleging that the controversy then for the first time became one wholly between citizens of different states. The removal petition did not allege fraud. Plaintiff in error, in its brief (17) admits that the local defendants were

joined in good faith. Thereafter plaintiff and all the defendants entered into and filed a stipulation (76) providing that the record should be amended. Thereafter on December 22, 1908, the record, upon plaintiff's motion theretofore duly filed, was amended in accordance with said stipulation. Plaintiff, during the term, and within four days after the Court sustained the demurrers of defendants Martin and Eilers, filed motions requesting the court to set aside the involuntary non-suit taken by plaintiff with reference to defendants Martin and Eilers and to reinstate the cause upon the docket as to said defendants upon the ground that the Court erred in sustaining the demurrers to the evidence, etc., which motions were, over plaintiff's objection and timely exception, overruled. Thereafter on the 28th day of January, 1909, during the term, plaintiff filed her affidavit of appeal from the judgment and decision of the Court as to defendant Quincy Martin on the first count of her petition, which appeal was granted to the Supreme Court of Missouri, where it is still pending. The Circuit Court of the City of St. Louis rightfully overruled the petition for removal filed by defendant, American Car & Foundry Company, and rendered judgment against said defendant in the sum of $5400.00, and the St. Louis Court of Appeals rightfully affirmed the judgment.

ARGUMENT

In the case of Collier vs. Swinney, 13 Mo. 478, plaintiff, after the Court sustained a demurrer to the evidence, took an involuntary non-suit, and after the entry of the non-suit upon the minutes, and before the jury had dispersed, prayed the Court to cancel the order of non-suit and allow the cause to proceed to judgment. This the Court refused. The Supreme Court of Missouri on appeal held that the trial court abused its discretion in refusing to set aside the non-suit and reversed and remanded the cause for re-trial.

Had the Court in this case, when plaintiff, before the removal petition was filed, asked it to do so, set aside the non-suit and permitted plaintiff to proceed, as the Supreme Court held should have been done in the Collier case, this cause would have been finally disposed of in the state courts, but the Court refused to set aside the non-suit, over plaintiff's objection and timely exception, so our present dilemma is due to an adverse and erroneous ruling of the trial court made over plaintiff's objection and timely exception, error which can and necessarily and rightfully will be corrected on appeal.

We may, with propriety, dismiss defendant Eilers from our consideration, also the second count of plaintiff's petition, also the cause of action under the first count arising under Secs. 2865 and 2866, retaining for consideration the defendants, American Car & Foundry Company and Martin, the cause of action

State to Use, Resp., vs. Kessler, 15 Mo. App. 590;
Central Transportation Co. vs. Pullman Palace Car Co., 139 U. S. 24.

See also:

Lewis vs. Mining Co., 199 Mo. 463-468;
Williams vs. Finks, 156 Mo. 597-607;
Sachse vs. Clingingsmith, 97 Mo. 406-410;
Overall, Admr. of Payne vs. Ellis, 32 Mo. 322-328;
Dowd vs. Winters, 20 Mo. 361-363;
Hart vs. Rector, 7 Mo. 532-533.

In Chouteau vs. Rouse, *supra*, the Court said:

"When a voluntary non-suit is taken, the plaintiff abandons his suit and it is ended; and we have held that from the judgment entered upon it, no appeal will lie, and in such case the judgment is operative and enforceable, and the party thus suffering the non-suit must, to be protected by the statute, bring his action within one year after the judgment is rendered. But not so in the case of an involuntary non-suit, which the plaintiff, by some adverse ruling of the court, is driven or compelled to take, with leave to move to set the same aside, with a view **not to abandon** the prosecution of the suit, but to further **prosecute** it by appeal, and test the correctness of such ruling. Such appeal, when taken, removes the cause from the circuit to the appellate court, and, when bond is given, as in this case, the judgment of non-suit is superceded, and

> can only become operative and enforceable in the event of its being affirmed by the appellate court, and it is only when so affirmed that a plaintiff, in contemplation of this statute, can be said to suffer a non-suit."

It is unnecessary to waste the time of this Court stating the facts showing that plaintiff's appeal from the judgment of non-suit is still pending in the Supreme Court of Missouri because plaintiff in error in its statement (11), says:

> "It should also be stated that the plaintiff below, within the time allowed by the Missouri statutes, to-wit, within four days after the verdict of the jury was rendered, filed her motion praying the court to set aside the non-suit she had taken as to defendants Martin and Eilers and for a new trial as to them. That motion was overruled and plaintiff appealed to the supreme court, where her appeal is still pending."

Only when the judgment of non-suit as to Martin is affirmed can plaintiff be said to have suffered a non-suit. Should it be affirmed the non-suit is, in law, deemed to have been suffered on the date of affirmance. Until then there is a controversy between plaintiff on the one side and American Car & Foundry Company and Martin, citizens of different states, on the other, and no controversy wholly between citizens of different states.

Plaintiff's counsel did not, as contended, ask leave to get the individual defendants "back in again" but took the steps necessary under Missouri procedure to

keep Martin in to recover judgment against him **in this case.**

In determining whether or not the filing of the petition for removal deprived the state court of jurisdiction over the non-resident defendant we must determine whether or not at the time of the filing of such petition it had lost jurisdiction over Martin. If plaintiff had **voluntarily** terminated the controversy between plaintiff and Martin **before** the petition for removal was filed the petition should have been sustained. If, however, as we contend, there was when the removal petition was filed a controversy between plaintiff and Martin the state court retained jurisdiction notwithstanding the filing of the petition for removal. How can the state court be said to have lost jurisdiction over Martin at a time when it could, upon its own motion or on motion of plaintiff, without notice or further process, set aside its judgment of non-suit, reinstate, try the cause and render judgment. No new summons against Martin was necessary to enable the Court to take such steps. No notice was required. He remained "in court." Martin, by his counsel, on November 30, 1908, after the petition for removal was filed (75-6-7), entered into and filed a stipulation signed "William R. Gentry, attorney for defendants." The Court acted upon this stipulation (4 and 77) and all concerned understood that plaintiff still insisted, to the close of the trial, and still insists, upon her right to a judgment against Martin. Under these circumstances the case comes clearly within the rule laid down in:

Lathrop, Shea, Henwood vs. Int. C. & I. Co., 215 U. S. 247;
Alabama G. S. R. Co. vs. Thompson, 200 U. S. 206;
Kansas City, etc., R. R. Co. vs. Herman, 187 U. S. 63;
Knott vs. McGilvray, 124 Calif. 128;
McGilvray vs. Knott, 179 U. S. 680;
Bank of Maysville vs. Claypool, 120 U. S. 268;
Gregory vs. Hartley, 113 U. S. 742;
Howe vs. Northern Pacific R. R. Co., 30 Wash. 475.

The statute upon which the judgment against American Car & Foundry Company is based, now section 5425, R. S. Mo. 1909, is as follows:

"Damages for injuries resulting in death in certain cases, when and by whom recoverable.—Whenever any person, including an employe of the corporation, individual or individuals hereinafter referred to whose death is caused by the negligence of a co-employ thereof, shall die from any injury resulting or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe, whilst running, conducting or managing any locomotive, car or train of cars, or any street, electric or terminal car or train of cars, or of any master, pilot, engineer, agent or employe whilst running, conducting or managing any steamboat, or any of the machinery thereof, or of any driver of any stage coach, automobile, motor car or other public conveyance whilst in charge of same as a driver; and when any passenger shall die from any injury

resulting from or occasioned by any defect or insufficiency in any railroad, whether the same be a steam, street, electric or terminal railroad or any part thereof, or in any locomotive, car, street car, electric car or terminal car, or in any steamboat, or the machinery thereof, or in any stage coach, automobile, motor car, or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employe, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns, operates or conducts any such railroad, locomotive, car, street car, electric car, terminal car, automobile, motor car, stage coach or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency, unskillfulness, negligence or criminal intent above declared, shall forfeit and pay as a penalty, for every such person, employe or passenger so dying, the sum of not less than two thousand dollars and not exceeding ten thousand dollars, in the discretion of the jury, which may be sued for and recovered: First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, whether such minor child or children of the deceased be the natural born or adopted child or children of the deceased; provided, that if adopted, such minor child or children shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at

the time of such adoption; or, third, if such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, if such deceased unmarried minor shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor; or, fourth, if there be no husband, wife, minor child or minor children, natural born or adopted as hereinbefore indicated, or if the deceased be an unmarried minor and there be no father or mother, then in such case suit may be instituted and recovery had by the administrator or executor of the deceased and the amount recovered shall be distributed according to the laws of descent, and such corporation, individual or individuals may show as a defense that such death was caused by the negligence of the deceased. In suits instituted under this section, it shall be competent for the defendant, for his defense, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency, and that the injury received was not the result of unskillfulness, negligence or criminal intent."

This statute, when this case was tried, had not yet been construed. The evidence, instead of showing that Martin owned the plant, locomotive or cars, showed clearly that he was a switchman in the em-

ploy of defendant, American Car & Foundry Company. Plaintiff contended that the foregoing statute cast liability upon the guilty agent as well as upon the principal. The trial court, contrary to plaintiff's contention, held that under the foregoing statute the agent, even though guilty of the causal negligence charged, could not be held. Plaintiff, by electing, as to the first count, to stand upon the cause of action arising under the foregoing statute, dismissed as to all causes of action charged in the first count except the one arising under said statute. Thereafter the defendants, and each of them, refiled their original answers and thereby waived whatever, if any, right of removal accrued upon said election. The Court did not, by sustaining the demurrer, acquit Martin of guilt, but held that under the first count, after plaintiff, by election, dismissed as to all other causes of action except the one arising under said statute, Martin could not be held, because said statute does not cast liability upon the agent.

Plaintiff in error in support of its contention that the involuntary non-suit taken by Martin ended the litigation as to him cites:

West vs. McMullen, 112 Mo. 409;
Wiethaupt vs. St. Louis, 158 Mo. 655;
Meddis vs. Wilson, 175 Mo. 126;
Wetmore vs. Crouch, 188 Mo. 653;
Mason vs. Railroad, 226 Mo. 212;
Water Works Co. vs. School District, 23 Mo. App. *l. c.* 235;
Hudson-Kimberly Pub. Co. vs. Young, 90 Mo. App. *l. c.* 113;
Wing vs. Insurance Co., 167 Mo. App. *l. c.* 18.

Of these in their order:

In West vs. McMullen, *supra*, plaintiff took an involuntary non-suit, moved to set the same aside, succeeded, and thereafter recovered a judgment which the Supreme Court affirmed, showing conclusively that the involuntary non-suit "with leave" was not considered the end of the litigation.

In Wiethaupt vs. St. Louis, *supra*, plaintiff sued the City of St. Louis and George Prendergast jointly, and at the end of her case took an involuntary non-suit, with leave, as to Prendergast, but **failed to move to set the same aside.** Had plaintiff, in due time, filed a motion to set the same aside it would have been a continuation of the case against Prendergast, but no such motion was filed, therefore when her time to file it expired and her non-suit became final the suit was ended.

In Meddis vs. Wilson, *supra*, the Court simply held that a new suit might be brought within one year after "non-suit." The non-suit in that case was voluntary, without leave, and final. We do not question the ruling but contend it does not apply to the case at bar.

In Wetmore vs. Crouch, *supra*, the Court, at page 653, shows conclusively that a non-suit takes effect, not from the time it is taken, but from the time an appeal from an order overruling the motion to set it aside, is determined.

In Mason vs. Railroad Company, *supra*, plaintiff suffered an involuntary non-suit "with leave," duly moved to set the same aside, suffered an adverse ruling on said motion but failed to appeal. We respectfully request the Court to read pages 224 to 229, both

inclusive, of the opinion in this case, as the Court seems to hold, clearly, that an involuntary non-suit appealed from, does not become effective until the appeal is determined, approving the decision in Chouteau vs. Rowse, 90 Mo. 191.

In the case of Water Works Co. vs. School District, *supra*, the plaintiff took an involuntary non-suit and upon motion to set the same aside suffered an adverse ruling, from which it took no appeal. Thereafter it filed a second suit on the same cause of action. The Court held that the involuntary non-suit constituted a dismissal but did not decide whether the dismissal dated from the time the non-suit was **taken** or from the time the motion to set it aside was overruled. We concede that a voluntary non-suit as to a defendant ends the suit as to that defendant and that an involuntary non-suit as to a defendant ends the case as to such defendant **when it becomes final, but not till then**, and if instead of becoming final it is set aside then the prosecution of the cause as to such defendant is continued.

In Hudson-Kimberly Publishing Co. vs. Young, *supra*, plaintiff sued in Missouri, took a non-suit, refiled in Kansas, obtained a judgment and sued in Missouri on that judgment. The defendant, among other things, alleged that the Kansas court erred in holding that the judgment of non-suit in Missouri was not **res adjudicata**. It is true the Missouri court held that an involuntary non-suit from which no appeal was taken, constituted a dismissal, but the question was not raised whether dismissal dated from the date the involuntary non-suit was taken or from the date upon which it became final. Had plaintiff taken an involuntary non-suit and moved to set the same aside

the prosecution of the case would have continued until the matter was finally determined.

The case of Wing vs. Insurance Company, *supra*, differs essentially from the case at bar and is no authority on any point in this case.

Inasmuch as plaintiff has at all times since this suit was commenced insisted upon joint liability of American Car & Foundry Company and Martin, inasmuch as she still insists upon such joint liability and is following the Missouri procedure for the purpose of establishing liability against Martin as well as against American Car & Foundry Company, and inasmuch as the ruling against her as to Martin was **in invitum** we respectfully submit that all propositions in this case have been adjudicated by this Court in:

Lathrop, Shea, Henwood vs. Int. C. & I. Co., 215 U. S. 247;

Kansas City, etc., R. R. Co. vs. Herman, 187 U. S. 62.

Defendant in error asks that the judgment of the St. Louis Court of Appeals be affirmed and alleges that this writ of error was sued out for delay to starve her into a compromise, and prays this Honorable Court to award her, in addition to the six per cent interest which said judgment bears under the Missouri statute, damages at the rate of ten per cent upon the amount of the judgment, under the provisions of Paragraph 2 of Rule 23 of the Rules of this Honorable Court.

Respectfully submitted by

GEORGE SAFFORD,
Attorney for Agnes Kettelhake,
Defendant in Error.

tary non-suit as against them with leave to set it aside, the case is not then ended as against those defendants, nor is it until after affirmance by the appellate court or the expiration of plaintiff's time to appeal; the controversy does not become one solely between the plaintiff and the other defendants, and even if the latter are non-residents of plaintiff's State the case is not removable as to them. *Powers* v. *Chesapeake & Ohio Ry.*, 169 U. S. 92, distinguished.
171 Mo. App. 528, affirmed.

THE facts, which involve questions regarding removal from the state to the Federal court where the cause of action has been dismissed after trial as to all the defendants, resident of the same State as plaintiff, are stated in the opinion.

Mr. William R. Gentry, with whom *Mr. M. F. Watts* and *Mr. Edwin W. Lee* were on the brief, for plaintiff in error.

Mr. George Safford for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

Agnes Kettelhake was the widow of one Frank Kettelhake, who had been in the employ of the American Car & Foundry Company (hereinafter called the Car Company) at Saint Louis, Missouri. She brought her action to recover for the negligent killing of Kettelhake by the movement of a certain train of cars operated by the Car Company in the yard adjacent to its plant whilst Kettelhake was working under an unfinished car. Her action was brought in the Circuit Court of the City of Saint Louis, and the Car Company, a New Jersey corporation, William W. Eilers and Quincy Martin, citizens of Missouri, as was the plaintiff, were made joint defendants. It is conceded that the action was properly brought jointly against the Car Company and the defendants Eilers and Martin. The negligence charged was in substance that the defend-

ants omitted to instruct and require their employés to so mark cars under and about which other employés were engaged in work that all persons would know whether employés were working under such cars; negligently omitted to notify Kettelhake that defendants were about to move the car under which he was working; negligently omitted to discover that Kettelhake was under and repairing the car; and negligently caused the wheels and trucks of the car under which he was working to run over him.

Answers were filed and issues joined, and the case was called for trial in the Circuit Court of the City of St. Louis; and at the close of the plaintiff's evidence each of the defendants requested the court to give in its behalf a peremptory instruction to find for the defendant. Under the Missouri practice such instructions are usually referred to as demurrers to the evidence. The court sustained the demurrer offered by the defendant Martin and that offered by the defendant Eilers, and overruled the demurrer offered by the defendant Car Company, to which action of the court in sustaining the demurrers offered by Martin and Eilers, plaintiff then and there excepted, and saved her exceptions at the time. Plaintiff asked leave to take an involuntary non-suit as to the defendants Eilers and Martin, with leave to move to set aside the same, and leave to take such non-suit was granted by the court and said involuntary non-suit with leave to move to set aside the same was taken; thereupon the defendant Car Company orally asked the court for time to prepare and file a petition and bond for removal from the state court to the Federal court, which time the court then and there granted. Before said petition for removal and bond were filed, the plaintiff, by leave of court, orally moved the court to set aside the involuntary non-suit which plaintiff had taken as to defendants Martin and Eilers, which motion was then and there overruled. Thereupon the

Car Company filed its petition for removal to the Federal court and bond, which petition for removal was denied, to which denial the Car Company then and there excepted. At the same term, and within four days after the non-suits as to defendants Martin and Eilers were taken, and during the same term that the verdict and judgment were rendered, plaintiff filed separate motions praying the court to overrule the order theretofore made overruling plaintiff's motion to set aside said non-suits and reinstate the cause, and praying the court to grant plaintiff a new trial as to said defendants, which motions were overruled. Thereafter plaintiff filed her application and prayed an appeal as to the defendant Martin to the Supreme Court of Missouri, which appeal by order of the court duly entered of record was allowed, and it is conceded that the matter appealed from is now pending in the Supreme Court of Missouri, and, so far as it appears, is undecided.

A verdict was rendered in favor of the plaintiff against the Car Company, and afterwards the case was taken to the Supreme Court of Missouri, which court held that it had no jurisdiction and that the exclusive jurisdiction was in the St. Louis Circuit Court of Appeals, to which the cause was transferred. That court passed upon other questions to which it is not necessary to refer, and as to the right of removal held that the case was not a removable one. It is to that part of the judgment that this writ of error is taken.

To sustain its contention the plaintiff in error relies upon the case of *Powers* v. *Chesapeake & Ohio Railway*, 169 U. S. 92. In that case it appears that there were two petitions for removal in a case in which an action was brought against a non-resident railroad and two citizens of the same state as the plaintiff. The case was first removed to the Circuit Court of the United States, but upon motion was remanded to the state court, the United States court holding that there was no separable contro-

versy between the Railroad Company and the plaintiff. When the case was called for trial before a jury in the state court, the plaintiff discontinued his action against the individual defendants, and thereupon the Railroad Company filed a second petition for removal. That application was denied by the state court, but was granted by the Circuit Court of the United States, and the question was as to the propriety of the order of removal. It was held when the case was discontinued as to the defendants who were citizens of the same State with the plaintiff, the action became for the first time one against the Railroad Company alone, and therefore properly removable at that time.

In *Kansas City &c. Ry.* v. *Herman*, 187 U. S. 63, it was held that a case was not removable because the court had held that as to a resident defendant there was not sufficient evidence to warrant a verdict, and sustained a demurrer to the evidence. It was held that the ruling was on the merits and *in invitum*, and that there was nothing to show that the original joinder was in bad faith.

In *Fritzlen* v. *Boatmen's Bank*, 212 U. S. 364, the principle of the *Powers Case* was applied, and it was held that an application for removal under the circumstances there shown was within time under the ruling in the *Powers Case*.

In *Lathrop, Shea & Henwood Co.* v. *Interior Construction & Improvement Co.*, 215 U. S. 246, it was held that where the plaintiff insisted on the joint liability of the nonresident and resident defendants, the dismissal of the complaint on the merits as to the defendants who were citizens of the same State with the plaintiff did not make the case then removable, and did not prevent the plaintiff from taking a verdict against the defendants who might have removed the suit had they been sued alone or had there originally been a separable controversy as to them.

Taking these cases together, we think it fairly appears

from them that where there is a joint cause of action against defendants resident of the same State with the plaintiff and a non-resident defendant, it must appear to make the case a removable one as to a non-resident defendant because of dismissal as to resident defendants that the discontinuance as to such defendants was voluntary on the part of the plaintiff, and that such action has taken the resident defendants out of the case, so as to leave a controversy wholly between the plaintiff and the non-resident defendant. We do not think that situation is shown by this record. In other words, as the St. Louis Court of Appeals said, the resident defendants had not "so completely disappeared from the case as to leave the controversy one entirely between the plaintiff and a non-resident corporation." The trial judge recognized this when he overruled the motion to allow the petition for removal. In this connection the judge said:

"Under the evidence in this case Martin is not liable and in pursuance to that ruling you take a non-suit with leave to move to set the same aside; so that in my opinion he is still a party to the suit. Your motion to set aside the non-suit might hereafter be granted, and then we would have a section of the suit in the United States court and a section here."

This conclusion seems to be in conformity with the holdings of the Supreme Court of Missouri as to the effect of such non-suit. In *Chouteau* v. *Rowse*, 90 Missouri, 191, the Supreme Court of Missouri held that when a voluntary non-suit is taken the plaintiff abandons his suit and it is ended; and from the judgment entered upon it there is no appeal; but when a plaintiff is compelled, by the adverse ruling of the court, to take an involuntary non-suit with leave to move to set the same aside, with a view not to abandon the prosecution of the suit, but to test the correctness of the ruling by appeal, the appeal only removes the cause from the Circuit Court to the appellate

court, and, when bond is given, the judgment for non-suit is superseded, and can only become operative and enforceable in the event of its being affirmed by the appellate court. It is only when so affirmed that a plaintiff, in contemplation of the statute of Missouri (R. S., § 3239) can be said to suffer a non-suit. The same practice was recognized in *Nivert* v. *Railroad*, 232 Missouri, 626, and in *Lewis* v. *Mining Co.*, 199 Missouri, 463, 468.

We have examined the cases from the Supreme Court of Missouri, relied upon by the plaintiff in error, and we find nothing in them to militate against the conclusion reached in circumstances like those now presented. The ruling of the court sustaining the demurrer to the evidence interposed by the resident defendants practically determined the question of their liability, and, under the Missouri practice, as we understand it, there was a right to take an involuntary non-suit with leave to move to set it aside, and when that motion was overruled there was a remedy by appeal to the Supreme Court of Missouri, as was done in the present case, and the order is not final until the appellate court passes upon it.

We cannot agree to the contention that upon this record, when the court had sustained the demurrers to the evidence as to Martin and Eilers and plaintiff took the non-suit, the case was so far terminated as between the plaintiff and the resident defendants as to leave a removable controversy wholly between the plaintiff and a non-resident corporation.

The element upon which the decision in the *Powers Case* depended,—the voluntary dismissal and consequent conclusion of the suit in the state court as to the resident defendants,—is not present in this case.

We think the Court of Appeals of the City of St. Louis correctly ruled that the case is not a removable one, and its judgment is

Affirmed.

AMERICAN CAR & FOUNDRY COMPANY *v.* KETTELHAKE.

ERROR TO ST. LOUIS COURT OF APPEALS, STATE OF MISSOURI.

No. 138. Argued January 20, 1915.—Decided Febuary 23, 1915.

Where there is a joint cause of action against defendants resident of plaintiff's State and a non-resident defendant, in order to make the case removable as to the latter because of the dismissal as to the former, the discontinuance as to the resident defendants must have been the voluntary act of the plaintiff and have so taken the resident defendants out of the case as to leave the controversy one wholly between the plaintiff and the non-resident defendant.

Under the practice in Missouri, when the court has sustained demurrers by some of the defendants and allowed plaintiff to take an involun-